

# California Law Review

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VOL. 69

JANUARY 1981

No. 1

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## The Seventh Amendment Right To Jury Trial Of Antitrust Issues

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Antitrust litigation can be extraordinarily difficult and complex. The concern of the antitrust laws for competition and competitive market structures often requires the trier of fact to resolve vexing economic issues,<sup>1</sup> in addition to the more traditional civil trial issues of defendant's conduct and plaintiff's injury and damages. Such litigation can consume years of discovery and take months for trial.<sup>2</sup> Moreover, the economic issues are usually so technical and sophisticated that they must be introduced at trial through expert witnesses armed with charts,

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1. See generally F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* (2d ed. 1980); E. SINGER, *ANTITRUST ECONOMICS* (1968); L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST*, ch. 1 & app. A (1977). See also R. BORK, *THE ANTITRUST PARADOX* (1978); R. POSNER, *ANTITRUST LAW* (1976); Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1 (1980) (inaugural address occasioned by Professor Sullivan's appointment to the new Earl Warren Chair in Public Law at Boalt Hall School of Law, University of California).

2. See, e.g., *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (seven-month trial); *SCM Corp. v. Xerox*, 463 F. Supp. 983, 986 (D. Conn. 1978) (14-month trial; 38 days of jury deliberations); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 444 (N.D. Cal. 1978) (5-month trial; 19 days of jury deliberation; 87 witnesses whose testimony filled more than 19,000 pages of transcript; 2,300 evidentiary exhibits). See also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889, 895 (E.D. Pa. 1979) (20,000,000 documents produced for inspection; over 100,000 pages of deposition transcripts with many depositions still scheduled; estimated trial time of one year); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978) (in which the named plaintiff's case alone is estimated to require a minimum of four months of trial; the parties anticipate calling 115 witnesses and introducing over 1,200 trial exhibits; and uncompleted discovery had already produced 70 depositions, 13 sets of interrogatories, and 8 requests for admissions, all of which filled 15 large files in the clerk's office of the court).

graphs, and doctorate degrees in economics.<sup>3</sup> It is with some justification, then, that antitrust litigation has earned the reputation of presenting the paradigm "big case."<sup>4</sup>

Notwithstanding the protracted nature of the litigation and the difficulty of the issues involved, antitrust cases have traditionally been tried to juries. Unfortunately, jurors lack familiarity with many of the complex issues they are asked to decide.<sup>5</sup> This problem raises disturbing questions as to jurors' ability to decide such issues rationally and accurately. The problem is exacerbated by the procedures em-

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3. The problems associated with testimony by economic experts are compounded by the lack of consensus that often exists concerning basic economic propositions and the application of theory to fact. This difficulty was emphasized by authors of ABA ANTITRUST SECTION, MONOGRAPH NO. 3, EXPEDITING PRETRIALS AND TRIALS OF ANTITRUST CASES 56 (1979) [hereinafter cited as ANTITRUST MONOGRAPH] (footnotes omitted):

In the field of economics, even more so than in the exact sciences, there may be "no such animal as the neutral expert." Bhuel Webster notes that, by the very nature of the field, an economist is affected by political and social forces, because both the institutional and doctrinal associations and commitments of the economist negate his neutrality. Current social and political philosophy likewise play a substantial role in economic theories and prevent the economic expert from remaining truly non-partisan.

For an interesting example of the differences that can exist among economists concerning important matters of antitrust policy, compare Landes & Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. CHI. L. REV. 602 (1979) with Harris & Sullivan, *Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269 (1979). Also, compare Landes & Posner, *The Economics of Passing On: A Reply to Harris and Sullivan*, 128 U. PA. L. REV. 1274 (1980) with Harris & Sullivan, *Passing On the Monopoly Overcharges: A Response to Landes & Posner*, 128 U. PA. L. REV. 1280 (1980).

4. See, e.g., P. AREEDA & D. TURNER, 2 ANTITRUST LAW ¶ 318 (1978) ("Indeed, the antitrust case may involve so many issues, documents, witnesses, and lawyers as to defy comprehension."); L. SULLIVAN, *supra* note 1, at § 244 ("Antitrust litigation is renowned for its scope and complexity. These characteristics are hardly to be denied; they present myriad problems that must be dealt with."); Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199 (1976); Withrow & Larm, *The "Big" Antitrust Case: 25 Years of Sisyphean Labor*, 62 CORNELL L. REV. 1 (1976). The problems of complex antitrust litigation are also receiving attention in the press. See, e.g., Blum, *Trials & Errors: Jury System Is Found Guilty of Shortcomings in Some Cases*, Wall St. J., June 9, 1980, at 1, col. 1; Shaffer, *Those Complex Antitrust Cases*, Wall St. J., Aug. 29, 1978, at 16, col. 4.

5. See, e.g., Note, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775, 783-86 (1978) [hereinafter cited as Note, *Incompetent Jury*]; Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898, 899-900, 908-10 (1979); Note, *Jury Trials in Complex Litigation*, 53 ST. JOHN'S L. REV. 751 (1979).

Judge Conti's observations in *ILC Peripherals* graphically demonstrate the problem:

Throughout the trial, the court felt that the jury was having trouble grasping the concepts that were being discussed by the expert witnesses, most of whom had doctorate degrees in their specialties. This perception was confirmed when the court questioned the jurors during the course of their deliberations and after they were discharged. When asked by the court whether a case of this type should be tried to a jury, the foreman of the jury said, "If you can find a jury that's both a computer technician, a lawyer, an economist, knows all about that stuff, yes, I think you could have a qualified jury, but we don't know anything about that."

Record at 19,548, *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 447-48 (N.D. Cal. 1978). An exchange that took place between the judge and the jurors during the course of the trial illustrated the problem:

ployed for jury selection, which tend to skew jury composition by disproportionately excluding from jury service those jurors who might be more familiar with complex issues or who might possess higher levels of skill and education necessary for comprehension and rational decisionmaking.<sup>6</sup>

While there remain some defenders of traditional jury trials for complex antitrust cases,<sup>7</sup> it would probably not be far off the mark to suggest that most courts and commentators, were they writing on a

The Court: . . . Do you know what demand substitutability is, [Juror A]?

Juror [A]: Well, I would like to kind of look into that.

The Court: Okay. And how about the barrier to entry, [Juror B]?

Juror [B]: I would have to read about it.

The Court: And how about F.T.P., [Juror C]?

Juror [C]: That's fixed term plan.

The Court: And you understand the ramifications of that, do you think?

Juror [C]: Yes, your honor.

. . . . .  
The Court: All right. And how about reverse engineering? [Reverse engineering is a method of copying a competitor's product.]

Juror [C]: That's when you would take a product and you would alter it in a, or modify it for your own purpose; that is, you would reverse its function and use it in your own method.

The Court: And [Juror D], what is software?

Juror [D]: It's software.

The Court: Well, what is software?

Juror [D]: That's the paper software.

The Court: What's the hardware?

Juror [D]: That's the wires and hardware.

The Court: And what is—do you know what an interface is? [An interface is the connection between a computer and an auxiliary piece of equipment.]

Juror [D]: Yes.

The Court: What's that?

Juror [D]: The interface is the—I am not good in English, your honor.

The Court: No, that's all right.

Juror [D]: But it's the interface, you know.

The Court: Can you give me an example of that?

Juror [D]: Well, if you take a blivet, turn it off one thing and drop it down, it's an interface change; right?

Record at 19,490-91, *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978), quoted in Note, *The Right to a Jury Trial in Complex Civil Litigation*, *supra* at 908 n.60.

6. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540, slip op. at 37-38 (3d Cir. July 7, 1980). Because of the protracted nature of antitrust litigation, courts are generally willing to excuse jurors for whom jury service over an extended period of time would be an economic or family hardship. Furthermore, evidence suggests that persons with relevant educational or experiential background tend to be excused or challenged in disproportionately high numbers. The result tends to be a jury comprised of persons who are less educated, less skilled, and less burdened with the responsibilities of a job and family than would be representative of the jury pool initially summoned for service. See *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. at 447-48; *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. at 69-70; Note, *Incompetent Jury*, *supra* note 5, at 776-83 (making a detailed statistical analysis of the jury in *SCM Corp. v. Xerox Corp.*, 1978-2 TRADE CAS. ¶ 62,392 (D. Conn. 1978)). See also Harris & Liberman, *Can the Jury Survive the Complex Antitrust Case?*, 24 N.Y.U. L. REV. 611, 625 (1979); Note, *Jury Trial in Complex Litigation*, *supra* note 5, at 755-58.

7. See, e.g., *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889 (E.D. Pa. 1979), vacated and remanded, No. 79-2540 (3d Cir. July 7, 1980); Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47 (1977); Note,

clean slate, would eliminate or greatly restrict the use of juries in such cases.<sup>8</sup> The problem, of course, is that we do not write on a clean slate.<sup>9</sup> The discretion of a court to restrict the use of juries in antitrust cases is cabined by the command of the Seventh Amendment that "In suits at common law . . . the right of trial by jury shall be preserved."<sup>10</sup> Thus, the scope of the right to jury trial in an antitrust suit necessitates a determination of what is constitutionally "preserved" by the Seventh Amendment.

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*Preserving the Right to Jury Trial in Complex Civil Cases*, 32 STAN. L. REV. 99 (1979) [hereinafter cited as Note, *Preserving the Right*].

8. See, e.g., J. FRANK, COURTS ON TRIAL 108-45 (Princeton ed. 1949); 5 MOORE'S FEDERAL PRACTICE ¶ 38.02 (2d ed. 1980) [hereinafter cited as MOORE]; Harris & Liberman, *supra* note 6, at 611; James, *Right to a Jury Trial in Civil Cases*, 72 YALE L.J. 655 (1963); Kirkham, *supra* note 4; Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision-Making*, 70 NW. U.L. REV. 486 (1975); Note, *Incompetent Jury*, *supra* note 5, at 783-86; Note, *The Right to a Jury Trial in Complex Civil Litigation*, *supra* note 5; Note, *Jury Trials in Complex Litigation*, *supra* note 5. See also Kane, *Civil Jury Trial: The Case for Reasoned Iconoclasm*, 28 HASTINGS L.J. 1 (1976); Note, *Congressional Provision for Nonjury Trial Under the Seventh Amendment*, 83 YALE L.J. 401 (1973) [hereinafter cited as Note, *Congressional Provision*]. Courts expressing doubts as to jury competence in antitrust cases include *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540 (3d Cir. July 7, 1980); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978); *Bernstein v. United Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978). Similar doubts have also been expressed concerning nonantitrust cases; see, e.g., *Hyde Properties v. McCoy*, 507 F.2d 301, 306 (6th Cir. 1974) (interpleader action concerning fraudulent conveyances); *In re Boise Cascade Sec. Litigation*, 420 F. Supp. 99 (W.D. Wash. 1976) (securities fraud). Recently Chief Justice Warren E. Burger urged a detailed inquiry "into the possibility of some alternatives to jury trial for the protracted trials of issues which baffle all but the rarest of jurors." See Address by Chief Justice Warren E. Burger to the Conference of State Chief Justices (Aug. 7, 1979) (on file with the *California Law Review*). This was not the first occasion that the Chief Justice expressed concern over the use of juries in complex, protracted litigation. See *Burger Urges U.S. Justice System Revamp*, St. Paul Pioneer Press, Apr. 7, 1976, § 1, at 1, col. 1 (the press report on the Chief Justice's address to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice), cited in Higginbotham, *supra* note 7, at 47 n.1. Address by Chief Justice Warren E. Burger, Testimonial Dinner for Pennsylvania Supreme Court Justice Bell (Nov. 14, 1970), reprinted in 54 JUDICATURE 232 (1971); Burger, *The State of the Federal Judiciary—1971*, 57 A.B.A. J. 855 (1971).

9. As Professor James has noted:

No one has explicitly suggested re-examination of the whole matter [of the right to trial by jury] with a view to determining what issues or types of issues are best fitted for court trial or jury trial. If all were *tabula rasa*, and some solon were trying to devise an ideal system for the administration of justice, he would probably approach the jury trial problems with just such an inquiry in mind. And it may well guide the future course of those charged with amending or recasting constitutions or, within narrower compass, of legislators. But as a guide for *judicial*, as opposed to political, action in the matter any such test meets serious difficulties.

James, *supra* note 8, at 690-91 (footnote omitted).

10. In full, the Seventh Amendment provides:

In Suits at Common Law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved, and no fact tried by a jury, shall otherwise be re-examined in any Court of the United States, than according to the rules of the Common Law.

U.S. CONST. amend. VII.

Recently, a handful of courts<sup>11</sup> and commentators<sup>12</sup> have suggested that the Seventh Amendment right to jury trial may be denied in antitrust cases that are beyond the ability and competence of a jury to understand and decide rationally.<sup>13</sup> This "complexity exception" to the Seventh Amendment is generally said to rest on two grounds: First, that traditional historical Seventh Amendment analysis indicates that English courts of equity, rather than common law juries, tried complicated matters,<sup>14</sup> and, second, that the Supreme Court intended by language in a footnote in *Ross v. Bernhard*<sup>15</sup> to give trial courts discretion to deny a litigant jury trial of any issue thought to be beyond the competence of a jury.<sup>16</sup>

These efforts to create a broad complexity exception to the Seventh Amendment have met with strong dissent. The historical research of Professor Morris Arnold<sup>17</sup> and recent judicial decisions<sup>18</sup> have persuasively demonstrated the absence of an historical equity exception for complex cases. Moreover, a careful reading of *Ross* and the Supreme Court's post-*Ross* cases indicates that the footnoted language is simply too thin a reed upon which to rest a new, constitutionally based exception for complex cases.<sup>19</sup>

Rejection of a general complexity exception for antitrust cases does not mean, however, that all of the issues in an antitrust case must continue to be tried to a jury. It is the thesis of this Article that, consistent with the Seventh Amendment, judges may separately try and de-

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11. See *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. at 444; *Bernstein v. Universal Pictures Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978).

12. See, e.g., Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980); Note, *The Right to a Jury Trial in Complex Civil Litigation*, *supra* note 5.

13. Similar arguments have been made concerning nonantitrust cases. See note 8 *supra*.

14. See text accompanying notes 135-49 *infra*.

15. 396 U.S. 531 (1970); see text accompanying notes 130-75 *infra*.

16. These arguments, which focus entirely on the requirements of the Seventh Amendment, should be distinguished from those based upon the requirements of the due process clause of the Fifth Amendment, relied upon by the Third Circuit in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540, slip op. at 32-36 (3d Cir. July 7, 1980) to justify dispensing with the use of a jury in certain very complex cases. This Article does not attempt to resolve due process claims, but does note at text accompanying notes 397-410 that, to the extent due process may place limitations upon the Seventh Amendment right to jury trial, it is still necessary first to determine precisely the nature and scope of the Seventh Amendment right.

17. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980).

18. See particularly Judge Becker's thoughtful analysis in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889 (E.D. Pa. 1979). See also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540 (3d Cir. July 7, 1980); *In re Financial Sec. Litigation*, 609 F.2d 411 (9th Cir. 1979).

19. See text accompanying notes 144-75 *infra*.

cide economic market structure issues, while juries continue to decide questions of conduct and damages.

Part I of this Article will examine the historical test traditionally used to decide which issues are preserved for jury trial by the Seventh Amendment. It will be shown that, properly applied, the historical test functions in two stages: First, to decide whether a particular matter is legal or equitable, and second, if a matter is generally cognizable at common law, to determine which issues are to be decided by a jury and which by a judge.

Part II will describe recent attempts to create a broad complexity exception to the Seventh Amendment and will conclude that the Third and Ninth Circuit Courts of Appeals have correctly rejected such efforts.

The historical test will be applied to antitrust litigation in Part III. Part A examines the substance of antitrust law and concludes that there are three sets of basic issues: (1) Market structure issues, including the definition of relevant product and geographic markets, the level of market concentration among the leading firms in the industry, and the market power of individual firms; (2) conduct issues relating to the activities and intentions of a particular firm; and (3) injury and damage issues relating to the harm allegedly suffered by the plaintiff. Part B examines the significance and relationship of structure, conduct, and damage issues within the context of individual antitrust offenses. Finally, Part C explores relevant English history for analogues to modern antitrust issues and concludes that, while English common law juries decided conduct and damage issues, there are no close historical analogues for jury trial of market structure issues. Moreover, even if the history is pushed to find a rough analogue, issues that arguably may have had some similarity to modern market structure issues were tried not to juries, but to judges. Thus, in modern antitrust litigation, market structure issues should be tried by the trial judge, because the Seventh Amendment does not "preserve" such issues for jury trial.

Part IV suggests procedures that a court might employ for conducting litigation in which market structure issues are separately decided by the judge. Circumstances are identified in which it makes sense to conduct separate discovery and to try market structure issues early in the litigation. Finally, due process concerns, as recently articulated by the Third Circuit in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,<sup>20</sup> are discussed and a framework is suggested for melding the Fifth and Seventh Amendment concerns raised by complex antitrust litigation.

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20. No. 79-2540 (3d Cir. July 7, 1980). See note 16 *supra*.

Part V concludes the Article by identifying and evaluating the benefits that may be expected from a new allocation of decisionmaking between judge and jury in antitrust litigation that transfers the trial of market structure issues to the judge.

# I

## THE HISTORICAL APPROACH TO THE SEVENTH AMENDMENT

### A. *Early Developments*

In suits at common law, the Seventh Amendment "preserves" the right to jury trial.<sup>21</sup> This language suggests a neutral design for the amendment, neither expanding nor contracting the right to jury trial as it existed in 1791.<sup>22</sup> As the Supreme Court stated in *Atlas Roofing Co. v. Occupational Safety Commission*,<sup>23</sup>

The Seventh Amendment was declaratory of the existing law, for it re-

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21. *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935). FED. R. CIV. P. 38(a) also provides that "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." The right, however, must be claimed by a timely written demand for a jury trial or it is waived. *See* 5 MOORE, *supra* note 8, ¶ 38.39[1]-[2]; 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2318 (1971). When a timely demand for jury trial has been made, opposition, if any, usually takes the form of a motion to strike, although FED. R. CIV. P. 39(a)(2) expressly provides that the court "of its own initiative" may strike a jury demand if it finds "that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States." *See* 5 MOORE, *supra* note 8, ¶ 39.04. Parties may also voluntarily waive their right to jury trial. An interesting example of a hybrid waiver took place in *Transamerica Computer Co. v. IBM Corp.*, 459 F. Supp. 626 (N.D. Cal. 1978). There, although the court felt bound by the Seventh Amendment to sustain plaintiff's demand for jury trial in an antitrust case, it must have anticipated the difficulties jurors might have in such complex litigation, for the court was able to convince both sides to enter into a stipulation which provided that, in the event the jury was unable to reach a verdict, the parties would agree to a decision by the court. The court's fears proved well founded when, after a month of trial and days of jury deliberation, the jury deadlocked and was unable to render a verdict. The court then took the matter under submission and decided in favor of the defendants.

22. That "preserving" language was used is not surprising in light of the drafters' debate concerning the appropriate scope of the right to jury trial. The language appears to have been selected as a compromise, since the individual jury practices of the different colonies were so diverse. *See* Arnold, *supra* note 17, at 832-38; Arnold, *A Modest Replication to a Lengthy Discourse*, 128 U. PA. L. REV. 986, 987 (1980). *See generally* Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 654 (1973) ("Civil jury trial was a part of the familiar pattern of judicial administration in courts of general jurisdiction in each of the colonies, although with local variations in the kinds of cases in which it was used and the procedures which accompanied its use.").

23. 430 U.S. 442, 459-60 (1977). *See also* 5 MOORE, *supra* note 8, ¶ 38.11[2]; Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281, 1339 (1978) ("[T]he amendment only guarantees that the common law jury will perform its historic function."); McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1 (1967).

quired only that jury trial in suits at common law was to be "preserved." It thus did not purport to require a jury trial where none was required before. . . . [T]he Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases. It took the existing legal order as it found it . . . ."

To understand and give content to the scope of the right that is preserved, the Supreme Court has made clear that reference must be made to the common law of England<sup>24</sup> as it existed in 1791,<sup>25</sup> the year the Seventh Amendment was adopted. The essence of the Court's historical approach to the Seventh Amendment is thus an inquiry into what matters were actually decided by English juries in 1791.<sup>26</sup>

Typically, the historical approach has been applied only at one level, to determine whether a matter was one tried at common law or in equity in England in 1791. Because juries were employed only at common law,<sup>27</sup> characterizing a matter as equitable ends further inquiry, since if a matter is equitable, there is no right to jury trial to be preserved by the Seventh Amendment. For example, modern claims for

24. See *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812), in which Mr. Justice Story stated:

Beyond all question, the common law here alluded to [in the Seventh Amendment] is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds for this opinion, because they must be obvious to every person acquainted with the history of the law.

See also *Capital Traction Co. v. Hof*, 174 U.S. 1, 8 (1899). While Mr. Justice Story might have thought that reference to English practice was obvious, Wolfram notes that "No federal case decided after *Wonson* seems to have challenged this sweeping proclamation; perhaps later judges have hesitated to appear to be the kind of intractable person that would require Mr. Justice Story to elaborate on the obvious." Wolfram, *supra* note 22, at 641.

25. See *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935) ("The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted."); *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935) ("In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791."). This principle has been reaffirmed in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 344-45 (1979).

26. Most commentators have acknowledged the centrality of the historical test in Seventh Amendment jurisprudence. See, e.g., F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 8.1, at 347-48 (1977); 5 MOORE, *supra* note 8, § 38.08[5.-4]; 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2301, at 14 (1971); James, *supra* note 8, at 668 ("For good or evil, both the constitutions and the charters of the merged procedure embody the policy judgment, quite deliberately made, to leave the extent of jury trial about where history had come to place it."); Henderson, *supra* note 22; Kane, *supra* note 8, at 2-6; McCoid, *supra* note 23, at 1-2; Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442, 448 (1971); Wolfram, *supra* note 22, at 639-45, 648-49, 720-21.

27. See, e.g., 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 446 (6th ed. 1938); F. JAMES & G. HAZARD, *supra* note 26, at 347-48. Although the use of juries was not part of the equitable system of trial, it has been noted that the chancellor had discretion to refer issues of fact for jury determination. Compare Chesnin & Hazard, *Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791*, 83 YALE L.J. 999 (1974) with Langbein, *Fact Finding in the English Court of Chancery: A Rebuttal*, 83 YALE L.J. 1620 (1974).



injunctive relief or specific performance are tried to a judge today because they were tried in equity in England in 1791.<sup>28</sup>

On the other hand, determining that a matter is one generally tried at common law complicates the historical inquiry. For, despite the tendency that may exist to end the analysis and find the entire case jury triable,<sup>29</sup> a *second stage* of historical inquiry should be undertaken to determine what *issues* in a common law jury trial were decided by the jury and therefore are preserved by the Seventh Amendment for jury trial today. Although jury trial was one of the hallmarks of common law litigation, not every issue in a common law action was jury tried. To the contrary, certain issues were decided by common law judges without the aid of a jury.<sup>30</sup> Professor Moore has noted the point well:

Under the first provision [of the Seventh Amendment, which provides that the right of trial by jury shall be "preserved,"] it is not enough that the action is a common law suit or that particular issues arise in a common law suit. Hence, if the action is a common law suit but no right of jury trial was enjoyed by the common law of England as to that type of action, then there is no right to jury trial by virtue of the Seventh Amendment. [Or] if the action is one where there is a right to jury trial as a general proposition, but the right does not extend to some issues in the case, then there is no right to jury trial as to the latter issues.<sup>31</sup>

Thus, properly applied, the historical approach to the Seventh Amendment mandates a second stage of analysis to determine which issues were actually decided by English common law juries in 1791 and which issues were decided by common law judges.<sup>32</sup> Only for those

28. 9 C. WRIGHT & A. MILLER, *supra* note 21, §§ 2308-2309, at 41-47. Note, however, that after the merger of law and equity, if equitable and legal issues are combined in the same case, then the overlapping factual issues must be tried to a jury. *See* text accompanying notes 76-86 *infra*.

29. *See, e.g.,* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889 (E.D. Pa. 1979). *See also* Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830).

30. *See* 5 MOORE, *supra* note 8, ¶ 38.38[4], at 339-40 (citations omitted):

While most actions of a legal nature are triable to a jury, on timely demand, (1) not all issues of fact in a legal action are so triable and (2) not all legal actions carry with them a right of jury trial. Illustrative of issues of fact in category (1), which are determinable by the court rather than by a jury, are: those relative to jurisdiction, venue and forum non conveniens; the existence and effect of foreign law where not judicially noticeable; the competency of a witness; issues of fact, including damages, in a default case; whether or not there has been such willful and malicious negligence in a tort case as to justify issuance of a certificate of close jail execution; and issues relative to civil contempt. Illustrative of legal proceedings in which there is no right to a jury trial are: an action to condemn property under the law of eminent domain, except to the extent given by statute or rule of court; a habeas corpus proceeding; an action at law against the United States unless it consents to jury trial; a disbarment proceeding, even where the act upon which the disbarment proceeding is based is an indictable offense.

31. *Id.* ¶ 38.08[5.-6].

32. Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935) ("The aim of the Amendment, as this Court has held, is to preserve the substance of the common-law right of trial

issues tried to juries in 1791 is the right to jury trial preserved by the Seventh Amendment.<sup>33</sup>

### B. Modern Developments

The historical approach has been widely accepted as the cornerstone of Seventh Amendment jurisprudence. Although looking into English jury practice in 1791 may appear somewhat arcane and inflexible, the historical approach has certain virtues. It is faithful to the actual language of the Seventh Amendment and the compromises that were struck when the amendment was drafted.<sup>34</sup> It also provides a relatively sure standard that has proven to be judicially administrable and has largely avoided the problems of ad hoc judicial decisionmaking that would attend a more functional analysis.<sup>35</sup> Moreover, the historical approach has retained vitality because it has not remained static. Five important developments that have increased its usefulness and

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by jury . . . and particularly to retain the common-law distinction between the province of the court and that of the jury . . . "); Wolfram, *supra* note 22, at 640:

The same historical test is also employed to answer civil jury trial questions beyond the initial inquiry into whether a jury is required at all. Thus the historical test is used to determine such issues as the respective provinces of judge and jury in a case tried to a jury . . . . English practice in 1791 determines all.

See also Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1890 (1966); Henderson, *supra* note 22, at 289-91.

33. Two-stage historical analysis is usually a more useful and accurate determinant of the scope of the right to jury trial than the "law/fact" distinction occasionally employed by courts. Under the latter scheme, questions of "law" are matters for judicial determination while questions of "fact" are to be resolved by a jury. See, e.g., Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1, 2 (1922), in which Professor Isaacs observes that "[Lord] Coke's Latin maxim which assigns questions of law to the judge and questions of fact to the jury . . . still stands among the first learned by the Freshman in his course in Pleading and absorbed by the layman in his course of service as a jurymen or witness." Like many of the law's venerable "rules of thumb," however, this law/fact distinction serves primarily to cloak with a conclusory characterization an allocation of decision making authority based on more complex considerations of policy and historical practice. See THE LEGAL CONSCIENCE—SELECTED PAPERS OF FELIX COHEN 37 (L. Cohen, ed. 1960) ("The vivid fictions and metaphors of traditional jurisprudence [represent] poetical and mnemonic devices for formulating decisions reached on other grounds.") See also L. GREEN, JUDGE AND JURY 279 (1930) ("[B]y and large the terms 'law' and 'fact' are merely short terms for the respective functions of judge and jury."). Indeed, because so many issues deemed matters of law plainly involve determinations of fact and issues of fact commonly are intertwined with the application of law, see Green, *Mixed Questions of Law and Fact*, 15 HARV. L. REV. 271 (1901); Weiner, *supra* note 32, at 1868-76, courts and commentators have seldom been able to draw intellectually satisfying definitional distinctions between law and fact, other than to state tautologically that questions of fact are those not decided by a judge. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 202-07 (1898); Weiner, *supra* note 32, at 1862. For the purpose of Seventh Amendment analysis, it is important to recognize that the critical inquiry is not whether something is a matter of law or fact, but rather which issues at common law were actually tried to juries and which to judges. That inquiry should turn on historical research whenever possible, rather than on a rough rule of thumb which may be distracting or incapable of providing reliable guidance.

34. See note 22 *supra*.

35. See text accompanying notes 172-75 *infra*.

flexibility are discussed below, with an emphasis on their impact upon antitrust litigation.

### 1. Reasoning by Analogy

Since the Seventh Amendment only "preserves" the right to jury trial, an argument could be made that the right to jury trial should be restricted to only those specific common law matters that were actually tried to juries in England in 1791, thereby excluding from jury trial all rights and causes of action created by statute after 1791, unless the statute expressly provides for jury trial.<sup>36</sup> Since modern antitrust statutes literally were not part of English common law in 1791,<sup>37</sup> under this theory jury trial would not be required. The Supreme Court, however, has taken a more expansive view and has made clear that the Seventh Amendment may be applicable to new statutory causes of action,<sup>38</sup> if the issues involved bear a close analogy to issues tried by English juries in 1791.<sup>39</sup> Although the search for an historical analogue is not compelled by the language of the Seventh Amendment, the Supreme Court has reaffirmed this approach on many occasions.<sup>40</sup> Conversely, there is no constitutional right to a jury trial of issues that did not exist in England in 1791 or that have no close historical analogues.<sup>41</sup> Thus, Seventh Amendment analysis of antitrust litigation will require exploration of English analogues.

36. See Redish, *supra* note 8, at 517, 530-31. In order to create "flexibility" in Seventh Amendment analysis, Professor Redish urged that a "rigid historical approach" be adopted which rejects reasoning by analogy and any modern procedural developments that have eliminated the need for equity. While such an approach might indeed create flexibility and reduce the incidence of jury trial, as Professor Redish argues, it has not been embraced by any court, no doubt because to do so would require overruling numerous Supreme Court cases. See text accompanying notes 41-86 *infra*.

37. See text accompanying notes 278-362 *infra*.

38. See *Curtis v. Loether*, 415 U.S. 189 (1974), in which the Court held:

[W]e have often found the Seventh Amendment applicable to causes of action based on statutes. See, e.g., *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477 (1962) (trademark laws); *Hepner v. United States*, 213 U.S. 103, 115 (1909) (immigration laws); cf. *Fleitmman v. Welsbach St. Lighting Co.*, 240 U.S. 27 (1916) (antitrust laws), and the discussion of *Fleitmman* in *Ross v. Bernhard*, 396 U.S. 531, 535-536 (1970). Whatever doubt may have existed should now be dispelled.

415 U.S. at 193-94 (parallel cites and footnotes omitted).

39. See, e.g., *Pernell v. Southall Realty*, 416 U.S. 363, 375-76 (1974); *Curtis v. Loether*, 415 U.S. 189, 193-97 (1974); *Luria v. United States*, 231 U.S. 9 (1913); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 901; James, *supra* note 8, at 656; Note, *Congressional Provision*, *supra* note 8, at 406.

40. See *Pernell v. Southall Realty*, 416 U.S. at 375-76; *Curtis v. Loether*, 415 U.S. at 193-97.

Of course, the question remains concerning what is meant by "historical analogue," but the Supreme Court seems content to address this on a case-by-case basis, without articulating standards. See note 286 and accompanying text *infra*.

41. See, e.g., F. JAMES & G. HAZARD, *supra* note 26, at 350.

## 2. Issue-by-Issue Analysis

Until fairly recently, courts usually considered the question of the right to a jury trial as one to be decided on a whole-case basis.<sup>42</sup> Thus, if an action were predominantly equitable in nature, a judge would decide all questions. If a matter were thought to be one generally cognizable at common law, jury trial was presumed, with little further attention given to the respective decisionmaking roles to be played by the judge and jury. However, building upon *Beacon Theatres, Inc. v. Westover*<sup>43</sup> and *Dairy Queen, Inc. v. Wood*,<sup>44</sup> the Court in *Ross v. Bernhard*<sup>45</sup> refined the inquiry considerably, holding that "The Seventh Amendment question depends on the nature of the issue to be tried, rather than the character of the overall action."<sup>46</sup> Thus, the question of the right to jury trial is to be resolved with respect to individual issues within a case, not on the basis of the case as a whole.<sup>47</sup>

In the past, the issue-by-issue approach has been employed most often as part of the historical test's first stage of analysis, to distinguish between issues tried at common law and those tried in equity, particularly when legal and equitable issues overlap in the same case.<sup>48</sup> However, logically, and to conform to the "preserving" language of the Seventh Amendment, this approach should play an equally important role in the second stage of analysis, to determine which issues in a common law action should be tried to a jury and which to a judge.<sup>49</sup> Incorporating issue-specific analysis into the historical test, as applied to actions at common law, means that issues which were tried to common law juries should continue to be so tried today. However, issues in common law cases that were tried to a judge, or issues which simply did

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42. See cases cited note 29 *supra*.

43. 359 U.S. 500 (1959).

44. 369 U.S. 469 (1962).

45. 396 U.S. 531 (1970).

46. *Id.* at 538.

47. The Federal Rules of Civil Procedure also envision that courts will decide the scope of the Seventh Amendment right to a jury trial on an issue-by-issue basis. Rule 38(b) provides that "Any party may demand a trial by jury of any issue triable of right by a jury . . . ." Similarly, Rule 39(a)(2) states that the trial of all issues upon which a jury trial demand has been made shall be by jury, unless the court, either upon motion or by its own initiative, "finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States." Interpreting Rule 39(a)(2), Judge Friendly has observed that where "a jury demand includes issues as to which a party is not entitled to a jury trial, the court ought not to strike the demand altogether but should limit it to the issues on which a jury trial was properly sought . . . ." *Damsky v. Zavatt*, 289 F.2d 46, 48 (1961). See also *Ross v. Bernhard*, 396 U.S. 531, 538 (1970); *In re U.S. Financial Sec. Litigation*, 609 F.2d 411, 422-23, 426 (9th Cir. 1979); 5 MOORE, *supra* note 8, at ¶ 42.03; Kane, *supra* note 8, at 9-10.

48. See, e.g., *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); text accompanying notes 76-84 *infra*.

49. See text accompanying notes 29-33 *supra*.

not exist in England in 1791 and have no close historical analogue at common law, are not preserved for jury trial by the Seventh Amendment and thus should be judge tried today.

This issue-by-issue approach, in a case generally cognizable at common law, was applied in *Martin v. Detroit Marine Terminals, Inc.*<sup>50</sup> The plaintiff in *Martin*, an employee of the defendant, sought to recover unpaid overtime compensation and liquidated damages under the Fair Labor Standards Act. The suit raised a number of issues, including whether defendant was liable for liquidated damages because its actions were not taken in "good faith." Although the statute specifically committed this issue to decision by the judge, the court was called upon to decide whether the Seventh Amendment preserved the issue for jury trial. In its discussion, the court observed that the statute created an action broadly analogous to the common law action of debt or assumpsit, and thus came under the protection of the Seventh Amendment. The question for decision, it concluded, was whether the Act's allocation of a single issue related to the penalty provision of the statute to judge rather than to jury trial rendered the entire scheme unconstitutional, or, as phrased by the court, "[whether] all issues in a statutory action broadly analogous to a common-law action must be tried to a jury pursuant to the Seventh Amendment. . . ." The court reached the correct answer when it held:

It appears that the jury trial protected by the Seventh Amendment goes only to issues in an action at law which historically were triable to a jury in England prior to 1791. In other words, in determining the scope of the Seventh Amendment with respect to one issue in a statutory action which is generally triable to a jury, the test is not whether such action is more or less broadly analogous to an established common-law action, but rather whether such issue must, by analogy or because of historical considerations, be characterized as a "legal" issue.<sup>51</sup>

Not finding a "good faith" fact issue or analogue in 1791 common law actions, the court held that the Seventh Amendment did not compel jury trial of the "good faith" issue.<sup>52</sup> It is this issue-specific approach that should be employed in antitrust actions generally, as part of the second stage of historical analysis.<sup>53</sup>

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50. 189 F. Supp. 579 (E.D. Mich. 1960).

51. *Id.* at 582 (emphasis added).

52. *Id.* at 583.

53. The Vermont Supreme Court adopted a similar approach in *Dempsey v. Hollis*, 116 Vt. 316, 75 A.2d 662 (1950). Upon a finding *by the judge* of wilfulness and maliciousness in certain tort cases, a Vermont statute gave the trial judge the authority to deny the tortfeasor liberties of the jailyard. In determining whether trial to the court on this particular issue violated the defendant's right under the state constitution to jury trial, the Court stated:

Therefore it appears as a matter of historical fact that at the time of the adoption of our Constitution of 1793 any judgment debtor could be taken on a body execution whether

### 3. *Accommodation of Procedural Changes*

The Supreme Court has demonstrated a readiness to accommodate procedural reforms that do not alter the substance of the right to jury trial. As stated in *Baltimore & Carolina Line, Inc. v. Redman*,<sup>54</sup> "The aim of the Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury . . . ."<sup>55</sup> Thus, the Court has turned away from Seventh Amendment challenges to directed verdicts,<sup>56</sup> summary judgments,<sup>57</sup> retrial of limited issues,<sup>58</sup> and offensive collateral estoppel,<sup>59</sup> even though each of these developments has had the effect of restricting the historic domain of the civil jury.

The Court's most significant efforts to accommodate procedural reform, however, have involved the merger of law and equity. England in 1791 maintained separate court systems for equity and the common law.<sup>60</sup> When Congress enacted the Judiciary Act of 1789,<sup>61</sup> it created a single federal judicial system in which the trial courts maintained separate equity and law dockets or "sides" of the court.<sup>62</sup>

Thus, prior to merger, issues which would have been tried to juries at common law in England in 1791, or which possessed close analogues to issues so tried, were tried to juries on the law side of federal courts.<sup>63</sup> Resort to the equity side of the court occurred when the common law did not offer complete relief or when a particular form of equitable relief was more desirable than the relief available at law.<sup>64</sup> All of the

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or not the cause of action arose from the wilful and malicious act or neglect of the defendant. The Act of 1823, chap. 15 § 1, granting the defendant the right to have the question of whether his conduct constituted a wilful and malicious act or neglect determined by the court, gave him a privilege he had not previously possessed. So, not being a known right at the time of the adoption of the Constitution, it was not included within the guarantee of Article XII of the Constitution.

*Id.* at 319 (citations omitted). See also *Weimer*, *supra* note 32, at 1892.

54. 295 U.S. 654 (1935). See also *Parklane Hosiery Co. v. Shore*, 439 U.S. at 336-37.

55. 295 U.S. at 657.

56. *Galloway v. United States*, 319 U.S. 372, 388-94 (1943).

57. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902).

58. *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 497-99 (1931).

59. *Parklane Hosiery Co. v. Shore*, 439 U.S. at 333-37.

60. See note 27 *supra*.

61. Judiciary Act of 1789, ch. 20, §§ 1-35, 1 Stat. 73 (1789).

62. See 5 MOORE, *supra* note 8, ¶ 38.08[5].

63. See generally *id.* ¶¶ 38.03, 38.08[5.-4].

64. See generally F. JAMES & G. HAZARD, *supra* note 26, §§ 8.4-.10 (2d ed. 1980); 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2302, at 17-18. See also C. LANGDELL, A BRIEF SURVEY OF EQUITY JURISDICTION 252-53 (1905); J. POMEROY, EQUITY JURISPRUDENCE §§ 217-218 (5th ed. 1941); J. STORY, EQUITY JURISPRUDENCE §§ 473-474 (4th ed. 1846).

issues raised in equity were triable by a judge.<sup>65</sup> Moreover, once the court had jurisdiction in equity, it was able to employ the doctrine of "equitable cleanup" to decide the entire case, even though doing so might require the judge to decide questions which would have been tried to a jury had the issues been raised separately in a suit at common law.<sup>66</sup>

The merger of law and equity in federal courts in 1938, however, upset this established practice.<sup>67</sup> Under the new Federal Rules of Civil Procedure, which provided a single form of action and uniform rules of procedure,<sup>68</sup> parties were permitted to join legal and equitable claims and remedies.<sup>69</sup> The rules also made provision for permissive and compulsory counterclaims, which might be legal or equitable.<sup>70</sup> Thus, it was not at all clear which issues would be jury tried or what the sequence of trial would be in the event certain issues were to be jury tried and others judge tried.<sup>71</sup>

The Supreme Court sought to accommodate the merger of law and equity in a trilogy of cases concerned with the right to a jury trial of certain issues. In *Beacon Theatres*,<sup>72</sup> *Dairy Queen*,<sup>73</sup> and *Ross*,<sup>74</sup> the Court considered jury demands on issues that previously would have been tried in equity because procedural impediments or other deficiencies at common law prevented a suitor from obtaining adequate legal relief. The Court held that the parties now have a right to jury trial in such instances, where procedural developments, such as the adoption of the Federal Rules of Civil Procedure or the Federal Declaratory Judgment Act, have removed the former procedural obstacles to an ad-

65. The chancellor could, however, refer issues of fact to common law courts for jury determination. Compare Chesnin & Hazard, *supra* note 27 with Langbein, *supra* note 27.

66. See *Greeue v. Louisville & Interurban R.R. Co.*, 244 U.S. 499, 520 (1917) ("Having properly acquired jurisdiction of a cause for any purpose, [equity] should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law."); F. JAMES & G. HAZARD, *supra* note 26, § 8.2, at 352-55; 5 MOORE, *supra* note 8, ¶ 38.19[2].

67. In *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486 (5th Cir. 1961), Judge Wisdom noted the problems created by the merger of law and equity:

In 1938 merger of the federal courts of law and equity caused considerable uncertainty in the determination of jury trial rights; the liberal joinder provisions and the broad, sometimes mandatory counterclaim provisions of the Federal Rules mixed legal and equitable causes in a single litigation with unprecedented frequency. . . . The difficulty comes in deciding whether the legal or the equitable cause should be tried first—an issue of practical importance to litigants, since the determination of either cause acts as collateral estoppel on common questions of fact in the other.

*Id.* at 488.

68. See FED. R. CIV. P. 1, 2.

69. See FED. R. CIV. P. 18.

70. *Id.*

71. See note 67 *supra*.

72. 359 U.S. 500 (1959).

73. 369 U.S. 469 (1962).

74. 396 U.S. 531 (1970).

equate remedy at law.<sup>75</sup> Both *Beacon Theatres* and *Dairy Queen* were suits involving legal and equitable claims that shared common factual issues.<sup>76</sup> The Court acknowledged that, before merger, equity could have enjoined the legal claims that were presented as counterclaims in *Beacon*<sup>77</sup> or granted damages in *Dairy Queen* as "incidental" to the equitable relief sought.<sup>78</sup> Thus, before merger, jury trial of factual issues common to the legal and equitable claims would have been curtailed.<sup>79</sup> The Supreme Court, however, held that after merger all factual questions common to the legal and equitable issues were to be tried first to a jury.<sup>80</sup>

*Ross* presented the Court with a different type of procedural problem, yet the resolution reached was similar. *Ross* was a shareholders' derivative suit for damages caused by alleged misconduct and breach of fiduciary duties by the corporate directors. Although the issues underlying the merits of the plaintiffs' claim were legal in nature, a shareholders' derivative action was traditionally tried in equity without a

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75. See, e.g., 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2302, at 24; Kane, *supra* note 8, at 8-9, 11; Note, *Congressional Provision*, *supra* note 8, at 408-10; Note, Ross v. Bernhard: *The Uncertain Future of the Seventh Amendment*, 81 YALE L.J. 112, 118-21 (1971).

76. *Beacon Theatres* was a suit for declaratory and injunctive relief filed against a defendant that allegedly was threatening to bring an antitrust action against the plaintiff. The plaintiff asked that the district court declare plaintiff's conduct reasonable and not violative of the antitrust laws and asked further that the defendant be enjoined from filing an antitrust suit pending the outcome of the declaratory judgment action. However, the defendant, *Beacon Theatres*, promptly filed a compulsory counterclaim seeking treble damages for alleged antitrust violations. The jury trial question, eventually resolved by the Supreme Court, was raised when the defendant sought a jury trial of all issues common to its antitrust claims and the plaintiff's complaint for declaratory relief. The district court held that the issues raised were "basically equitable" and therefore would be tried first to the court. The court of appeals agreed, holding that a court in the exercise of its equitable jurisdiction could also retain jurisdiction over the legal issues involved and could try the equitable issues first, even though the determination of common factual issues might, through collateral estoppel, effectively deny a litigant jury trial of those issues on his legal claim. The Supreme Court reversed. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 505 (1959).

*Dairy Queen* was a suit by the owners of the "Dairy Queen" trademark against a licensee of the mark. The complaint alleged a breach of contract and sought injunctive relief and an accounting. The defendant denied any breach, pleaded a defense of laches and estoppel, and alleged that the plaintiffs had violated the antitrust laws in connection with their trademark. Defendant demanded a jury trial, but the district court granted plaintiff's motion to strike defendant's demand, stating that the action was "purely equitable," or, at most, any legal issues were "incidental" to the equitable issues and therefore could be tried to the court. When the court of appeals refused to upset the district court's order, the Supreme Court granted certiorari and reversed. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962).

77. *Beacon Theatres, Inc. v. Westover*, 359 U.S. at 505; 5 MOORE, *supra* note 8, ¶ 38.11[8.-2].

78. 5 MOORE, *supra* note 8, ¶ 38.16[2].

79. *Beacon Theatres, Inc. v. Westover*, 359 U.S. at 505-06; *Dairy Queen, Inc. v. Wood*, 369 U.S. at 471.

80. *Beacon Theatres v. Westover*, 359 U.S. at 510-11. See also *Dairy Queen, Inc. v. Wood*, 369 U.S. at 472-73. Of course, in cases where there are separate legal and equitable issues which do not share common facts, the court is free to order the sequence of trial with respect to those issues. See FED. R. CIV. P. 39, 42; 5 MOORE, *supra* note 8, ¶ 39.12.



jury.<sup>81</sup> The Court, however, held that after the merger of law and equity any legal issues underlying the corporate claim must be tried to a jury, since "after [a]doption of the [Federal Rules of Civil Procedure] there is no longer any procedural obstacle to the assertion of legal rights before juries, however the party may have acquired standing to assert those rights."<sup>82</sup>

Thus, the Court's treatment of merger has expanded the right to jury trial in cases where legal issues are joined in the same case with equitable issues. First-stage historical analysis is employed to determine whether an issue is legal or equitable. If both types of issues are present and also turn upon common facts, then legal issues which would have been tried by a jury at common law must be decided first. Second-stage historical analysis comes into play to determine whether the legal issues were decided by a judge or a jury.

#### 4. *Congressional Provision for Jury Trial*

As noted above, when statutes are silent on the question of jury trial right, the Court will apply the Seventh Amendment by searching for close historical analogues to the new statutory issues.<sup>83</sup> Congress need not, however, remain silent. It may expressly legislate an extension of the right to jury trial, either for matters that historically would not have been tried to a jury or for new statutory causes of action that did not exist in England in 1791.<sup>84</sup> For example, although tort and contract actions involving shipping on the Great Lakes traditionally would have been tried in admiralty jurisdiction without a jury, Congress enacted legislation specifically providing for jury trial of such actions.<sup>85</sup>

Thus, if Congress desired, it could specifically provide a statutory basis for jury trial in antitrust cases. It has not done so, however.<sup>86</sup> The

81. *Ross v. Bernhard*, 396 U.S. 531, 534 (1970); 5 MOORE, *supra* note 8, ¶ 38.11[8.-8].

82. 396 U.S. at 542. The Court recognized that "the stockholder's right to sue must first be adjudicated as an equitable issue triable to the court," but went on to hold that as a result of merger and the adoption of the Federal Rules of Civil Procedure,

[p]urely procedural impediments to the presentation of any issue by any party, based on the difference between law and equity, were destroyed. In a civil action presenting a stockholder's derivative claim, the court after passing upon the plaintiff's right to sue on behalf of the corporation is now able to try the corporate claim for damages with the aid of a jury.

*Id.* at 539-40 (footnote omitted).

83. See text accompanying notes 38-41 *supra*.

84. See, e.g., 5 MOORE, *supra* note 8, ¶ 38.12[1]; 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2302, at 15 (1971). See also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 901.

85. See *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 459-60 (1852); *Great Lakes Act*, 28 U.S.C. § 1873 (1948).

86. *Fleitmaim v. Welsbach St. Lighting Co.*, 240 U.S. 27 (1916), is cited occasionally for the

substantive and procedural antitrust statutes provide a private right of action,<sup>87</sup> but they do not address the question of the right to a jury trial.<sup>88</sup> When the statute is silent, the Supreme Court has nearly always assessed the right to jury trial on the basis of the Seventh Amendment.<sup>89</sup> There is no reason to believe the Court will do otherwise when

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proposition that the right to a jury trial in antitrust cases is statutorily based. *See, e.g., Harris & Liberman, supra* note 6, at 612. *But see Davis v. Marathon Oil Co.*, 57 F.R.D. 23, 24 (N.D. Ohio 1972). *Fleitmann* was a case in which the plaintiffs filed a shareholders' derivative action to recover treble damages for an antitrust injury alleged suffered by the corporation. At the time, before the merger of law and equity, this equitable action conflicted with the defendant's right to jury trial, which would have existed if the underlying corporate claim for treble damages had been filed. Today, the Federal Rules of Civil Procedure have merged law and equity and *Ross v. Bernhard*, 396 U.S. 531, 535-37 (1970), makes clear that a jury trial may be had for the legal claims within a shareholder's derivative action. *See* text accompanying notes 76-82 *supra*. In *Fleitmann*, the Court resolved the dilemma by holding, in dictum, that "when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law." 240 U.S. at 29. Rather than a declaration that the right to jury trial in antitrust cases is statutorily based, the Court's dictum appears to be a statement that it does not read the antitrust laws as interfering in any way with the Seventh Amendment's protection of the right to jury trial of damage and penalty issues. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540, slip op. at 18 (3d Cir. July 7, 1980). Thus, the Court found no congressional intention to permit the trial of treble damage actions in courts of equity, or to interfere in any other way with the right to jury trial as preserved by the Seventh Amendment. This interpretation of *Fleitmann* is supported further by the fact that the Court was affirming the Court of Appeals, which had held that the scope of the right to jury trial in antitrust cases was constitutionally determined. *See Fleitmann v. United Gas Improvement Co.*, 211 F. 103-05 (2d Cir. 1914).

87. Section 4 of the Clayton Act, 15 U.S.C. § 15 (replacing § 7 of the Sherman Act, ch. 647, § 7, 26 Stat. 209-10 (1890)) provides that:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

88. Attention to the statute is necessary because it is preferable to resolve the question of jury trial on a statutory basis in order to avoid reaching the constitutional question. *See, e.g., New York City Transit Authority v. Beazer*, 440 U.S. 568, 582 (1979), in which the Supreme Court noted that "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable," quoting *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944).

89. *Lorillard v. Pons*, 434 U.S. 575 (1978), is an exception to this practice, but it is easily distinguished from other cases of legislative silence on the issue of right to a jury trial. In *Lorillard* the Supreme Court interpreted the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1967), as providing a right to jury trial, despite the statute's silence on the issue. The legislative history of the Act, however, is quite unique. Congress expressly incorporated by reference into the Act remedial provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1938), which courts had already interpreted to require jury trial under the Seventh Amendment, *see* 434 U.S. 575, 580 n.7 (1978). Thus, Congress was found to have been well aware of the jury trial right attached to the remedial language it selected and therefore specifically to have intended that same jury trial right to be extended to the new Act. *Id.* at 580-85; *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540, slip op. at 15 (3d Cir. July 7, 1980). As Judge Becker observed in the district court:

[W]ith the sole exception of *Lorillard v. Pons*, the Supreme Court has consistently used a Constitutional analysis to determine the availability of trial by jury when the statute

it is finally called upon to decide the scope of the right to jury trial in antitrust cases.<sup>90</sup>

However, although there is no express language in the antitrust statutes providing for jury trial,<sup>91</sup> it might be argued that a statutorily based right to jury trial in antitrust cases should be inferred. An examination of the legislative history, however, fails to reveal the necessary congressional intent. Rather, a review of the few references<sup>92</sup> to jury trial that occurred in the course of debate preceding the passage of the Sherman Act and the Clayton Act indicates an awareness on the part of Congress only that a cause of action sounding in tort and providing treble damages as a penalty is likely to be treated under the Seventh Amendment as an action at common law, and thus accorded the historic incidents of jury trial rights as preserved by the Seventh Amendment.<sup>93</sup> There is no indication that Congress intended to extend or alter the right to jury trial beyond what the Seventh Amendment would preserve.<sup>94</sup>

In these circumstances, it cannot reasonably be argued that Congress has expressed itself with sufficient precision or clarity to make jury trial available for antitrust issues as a matter of statutory construction.<sup>95</sup> Moreover, even if a statutory right to jury trial were to be in-

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creating a cause of action is silent on the subject. This resort to Seventh Amendment analysis for most causes of action based on statutes implies strongly that mere congressional *awareness* of the applicability of the Seventh Amendment, like that evident in the legislative history of the antitrust laws, is not enough to make jury trial available as a matter of statutory construction.

Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. at 903 (emphasis in original).

90. In addition to the dictum in *Fleitmann*, see note 86 *supra*, the Supreme Court has made other oblique references to the antitrust statutes, but none can be viewed as holding that the right to jury trial is statutorily based. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 901-02.

91. The few existing congressional references to jury trial were collected and discussed by Judge Becker in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 902:

Scattered remarks of several Senators during the debates prior to passage of the Sherman Act show that they assumed that jury trials would be available in antitrust damage actions. See 21 Cong. Rec. 1767 (1890) (remarks of Sen. George); *id.*, at 2643 (remarks of Sen. Gray); *id.*, at 3149 (remarks of Sens. Morgan and George). A belief that parties in treble damage antitrust litigation were entitled to jury trial as a matter of constitutional right is also evident in the remarks of several members of Congress during the debate prior to passage of the Clayton Act. See 51 Cong. Rec. 9488 (1914) (remarks of Reps. Scott and Volstead); *id.*, at 9489 (remarks of Reps. Floyd and Volstead); *id.*, at 9491 (remarks of Reps. Green and Scott).

See also Harris & Liberman, *supra* note 6, at 612 n.8.

92. Not only were the congressional references to jury trial few in number, see note 91 *supra*, but the legislative record consists only of the Congressional Record and does not provide the detailed committee and subcommittee reports that were available for the Court's perusal and evaluation in *Lorillard v. Pons*, 434 U.S. 575 (1978).

93. See notes 91, 86 *supra*.

94. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540, slip op. at 16 (3d Cir. July 7, 1980).

95. See note 89 *supra*.

ferred from the meager legislative record, the only source of content for that right would appear to be the congressional references to the Seventh Amendment itself. Thus bottomed on the Seventh Amendment, the process of determining the scope of the statutory right to jury trial in antitrust cases would not differ from pure constitutional analysis.<sup>96</sup> It is necessary, therefore, to decide the constitutional question.

### 5. *Congressional Provision for Nonjury Trial*

With respect to the issues in newly created statutory causes of action that did not exist in England in 1791 or had no close historical analogues, Congress is free to provide expressly that there shall be no jury trial.<sup>97</sup> Such legislation would not abridge the Seventh Amendment because there is no prior jury trial right to preserve.

Even with respect to matters that historically would have been tried to a common law jury, if "public rights" are involved it appears that Congress may, consistent with the Seventh Amendment, create a special administrative agency to hear and decide all the issues involved.<sup>98</sup> This principle was expressed recently in *Atlas Roofing Co. v. Occupational Safety Commission*,<sup>99</sup> in which the Court upheld a legislative scheme whereby government-enforced civil penalties for health and safety violations in the work place were tried in an administrative agency without a jury. Drawing support from earlier cases,<sup>100</sup> the Court held:

When Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be "preserved" in "suits at common law." Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of

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96. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 904 n.24 ("Even if we were able to find the right to jury trial implicit in the [antitrust] statutory scheme, it would still be necessary to address the constitutional question in order to determine the scope of the statutory right, because the right incorporated by such an exercise of statutory construction is the constitutional right.").

97. See note 41 *supra*. See also 5 MOORE, *supra* note 8, ¶ 38.08[5].

98. See *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450 (1977); 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2302, at 2-3 (1980 Supp.); Note, *Jury Trials in Complex Litigation*, *supra* note 5, at 771-74.

99. 430 U.S. 442 (1977).

100. See, e.g., *Pernell v. Southall Realty*, 416 U.S. 363 (1974); *Curtis v. Loether*, 415 U.S. 189 (1974); *Katchen v. Landy*, 382 U.S. 323 (1966); *NLRB v. Jones & Laughlin Steel Corp.*, 308 U.S. 1 (1937).

an administrative agency.<sup>101</sup>

The Court's opinion is not very clear, which makes it difficult to determine the scope of "public rights" and how that concept will be applied in future cases. In an attempt to establish at least the broad outline of the concept, the Court stated that "public rights" at a minimum include "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes,"<sup>102</sup> but do not extend to cases litigating purely "private rights" or "[w]holly private tort, contract, and property cases."<sup>103</sup>

It is certainly arguable that, because the antitrust laws were enacted to protect the public's interest in a free and competitive economy and to serve the social and political goals of dispersing large aggregations of power and wealth, they involve "public rights" of the sort that concerned the Court in *Atlas*. Although the existence of a private right of action serves in large part to provide a means to recover damages for injuries actually suffered by an individual, the provision in the antitrust laws for treble damages and attorney's fees<sup>104</sup> can also be seen as an incentive to the individual to enforce the antitrust laws and thereby serve the greater public interest.<sup>105</sup> In these circumstances, it may be possible for Congress, consistent with the Seventh Amendment and *Atlas*, to establish a separate administrative agency with exclusive jurisdiction to hear all antitrust cases.<sup>106</sup> However, so long as antitrust

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101. 430 U.S. 442, 455 (1977).

102. *Id.* at 450.

103. *Id.* at 450 n.7, 458; see Note, *Jury Trials in Complex Litigation*, *supra* note 5, at 772. But see Kirst, *supra* note 23.

104. Clayton Act § 4, 15 U.S.C. § 15.

105. See, e.g., 2 P. AREEDA & D. TURNER, *supra* note 4, ¶ 343, at 227-28 (footnotes omitted); F. ROWE, F. JACOBS, M. JOELSON, *ENTERPRISE LAW OF THE 80's*, 185-86 (1980) (remarks by Frederick M. Rowe acknowledging the public interest served by private actions, but warning of potential abuses).

106. There might be some advantage to creating such an agency to adjudicate all antitrust cases. The factfinders would possess or at least develop expertise in the field which could not be matched by jurors exposed only to a single case. Moreover, because the administrative decisionmaker would have to base its decision on substantial evidence supported by written findings of fact and conclusions of law, 5 U.S.C. § 557(c), consistency and rationality within and among decisions may be more likely than that which is possible with the general verdicts permitted in jury-tried cases. Finally, absence of a general verdict would probably help appellate courts ensure more predictable doctrinal development and correct errors when they occur.

On the other hand, were Congress to give serious consideration to such a proposal, due account would have to be taken of a number of serious costs. The monetary cost of creating a specialized agency and its supporting staff and facilities would no doubt be high, even taking into account the reduced costs to the courts which would result from the elimination of antitrust suits from their dockets. But more importantly, moving all antitrust cases to an administrative agency might greatly reduce the level of antitrust enforcement, unless considerable sums were expended to increase the number of government enforcers. At present, the private bar accounts for over 95% of all civil antitrust enforcement efforts. Of the 1,496 civil cases filed in the 12-month period ending June 30, 1980, 1,457 cases were private. See ADMINISTRATIVE OFFICE OF THE U.S.

litigation is committed to the federal court system, the right to jury trial continues to exist to the extent that it is preserved by the Seventh Amendment.

## II

### THE UNSUCCESSFUL QUEST FOR A COMPLEXITY EXCEPTION TO THE SEVENTH AMENDMENT

Because Congress has neither expressly provided for jury trial of antitrust issues nor created an administrative agency to adjudicate exclusively such questions, the historical test must be relied upon to determine on an issue-by-issue basis which antitrust issues or close historical analogues were actually tried by English juries in 1791. However, rather than undertaking the necessary historical inquiry, a few district courts and legal commentators have labored to create a broad complexity exception to the Seventh Amendment that would remove some antitrust cases entirely from jury trial.<sup>107</sup> Two main approaches have been taken.<sup>108</sup> The first argues that an historical law/equity analysis demonstrates that judges exercising equitable jurisdiction, rather than common law juries, decided complex cases in 1791.<sup>109</sup> The second argues that in *Ross*,<sup>110</sup> the Supreme Court created a new, functional test for the Seventh Amendment that permits a trial court to deny jury trial in complex cases where the jury is believed to be incompetent to decide.<sup>111</sup> While these arguments may appeal to those

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COURT, ANNUAL REPORT, Table 22 (1980). See also F. ROWE, F. JACOBS & M. JOELSON, *supra* note 105, at 185 n.36.

107. See, e.g., *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978); Devlin, *supra* note 12; Note, *The Right to a Jury Trial in Complex Civil Litigation*, *supra* note 5.

108. In addition to Seventh Amendment challenges, jury trial of complex cases has also been attacked as a denial of Fifth Amendment due process rights and inconsistent with the fundamental fairness required of federal courts under article III. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540, slip op. at 32-43 (3d Cir. July 7, 1980); Note, *Incompetent Jury*, *supra* note 5, at 798-99; Note, *The Right to a Jury Trial in Complex Civil Litigation*, *supra* note 5, at 910-11.

The focus of this Article is upon the Seventh Amendment scope of the right to jury trial in antitrust cases. Regardless of how the Supreme Court eventually decides the due process and fairness claims with respect to complex cases, the Seventh Amendment approach taken in this Article will help reduce any due process or fairness concerns, because the allocation of decision-making between judge and jury argued for here is a more fair and rational allocation than that now occurring in complex antitrust cases. See note 16 *supra*; text accompanying notes 397-410 *infra*.

109. See, e.g., *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978); Devlin, *supra* note 12.

110. 396 U.S. 531 (1970).

111. *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978); Note, *The Right to a Jury Trial in Complex Civil Litigation*, *supra* note 5. Similar approaches have been adopted in securities fraud cases. *In re U.S. Financial Sec. Litigation*, 75 F.R.D. 702 (S.D. Cal.

who believe that juries should not decide complex cases, they are seriously flawed and were rejected recently by the Third<sup>112</sup> and Ninth<sup>113</sup> Circuit Courts of Appeals, the only circuit courts to have ruled on the validity of a complexity exception to the Seventh Amendment.<sup>114</sup>

### A. *The Law/Equity Approach*

The essence of this view is that equity was generally available to take jurisdiction whenever a case presented matters that were too difficult for a jury.<sup>115</sup> However, there is no credible historical evidence supporting the belief that such a broad equitable practice existed in England in 1791. The only cases over which it appears that equity actually assumed jurisdiction because of the complexity of the issues involved were cases of account,<sup>116</sup> which are not historical analogues to

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1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1866 (1980); *In re Boise Cascade Sec. Litigation*, 420 F. Supp. 99 (W.D. Wash. 1976).

112. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540 (3d Cir. July 7, 1980).

113. *In re U.S. Financial Sec. Litigation*, 609 F.2d 411 (9th Cir. 1979).

114. Judge Becker also rejected these arguments in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889 (E.D. Pa. 1979). An interlocutory appeal was granted by the Third Circuit, which upheld Judge Becker's rejection of a historical complexity exception to the Seventh Amendment but remanded for consideration of whether, in the context of this particular case, Fifth Amendment due process concerns override the demands of the Seventh Amendment. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540 (3d Cir. July 7, 1980). *See also* text accompanying notes 397-410 *infra*.

115. *See generally* Devlin, *supra* note 12. Others have put the argument somewhat differently: Equity stepped in whenever a legal remedy was inadequate; the inability of a jury to understand and rationally decide a complex case renders the legal remedy inadequate; therefore equitable jurisdiction exists for such complex cases. *See ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. at 447; Note, *The Right to a Jury Trial in Complex Civil Litigation*, *supra* note 5, at 905.

116. *See generally* Arnold, *supra* note 17; Arnold, *supra* note 22. *See also* Kirby v. Lakeshore & Michigan S. R.R., 120 U.S. 130, 134 (1887) ("The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity."); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 907-22; H. McCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY, § 202, at 540-41 (2d ed. 1948); Note, *The Right to a Jury Trial in Complex Civil Litigation*, *supra* note 5, at 906. The author of this last Note recognized that, other than the accounting cases, *see* note 117 and text accompanying notes 119-21 *infra*, there was an absence of historical evidence of equitable jurisdiction based simply on the complexity of a matter. Nevertheless, the author contends that the bill for accounting has broad implications:

The impact of the principle, however, cannot be confined to actions for an accounting. . . . The principles of the rule governing jury availability in actions for an accounting as applied in the context of modern litigation, not traditional categorizations, should determine the equitable or legal nature of an issue. If the issue defies accurate resolution by a jury, then, as with a complicated accounting, it should be found equitable and so beyond the reach of the Seventh Amendment.

Note, *The Right to a Jury Trial in Complex Civil Litigation*, *supra* note 5, at 906. The difficulty with this position is that it fails to adhere to the historical approach to interpreting the Seventh Amendment. The constitutional language of the Seventh Amendment states that jury trial rights are to be "preserved," and that language is neutral, neither contracting nor expanding jury trial rights. Historical inquiry indicates no equitable jurisdiction for complex matters other than accounting cases, which themselves are not analogous to modern antitrust litigation. *See* note 117 *infra*. Moreover, even if the accounting cases were viewed as a basis for equitable jurisdiction

modern antitrust litigation<sup>117</sup> and are not evidence of a *generalized* complexity basis for equitable jurisdiction.<sup>118</sup>

The ancient bill for an accounting was a narrow common law action, burdened with cumbersome procedures. The plaintiff first had to establish the duty of the defendant to account. The court then appointed one or more auditors, who actually rendered the accounting.<sup>119</sup> In the event that the auditors could not agree or the parties were not satisfied, the disputed issues would be separately tried before a jury.<sup>120</sup> However, when the accounting issues were too difficult for a jury to understand and determine, then jurisdiction could be established in equity, where the chancellor would decide without a jury.<sup>121</sup>

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generally in complex cases, that equitable jurisdiction was based upon the request of *plaintiff*, who controlled the forum choice. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 907-14. See also *Curriden v. Middleton*, 232 U.S. 633, 636 (1914) ("[M]ere complication of facts alone and difficulty of proof are not a basis for equity jurisdiction.").

117. See, e.g., *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 914, in which Judge Becker examined the antitrust claims and compared them to the historical accounting actions:

[T]his is simply not an accounting case. "There are no accounts between the parties. The cause of action is one arising in tort, and cannot be converted for an account." *United States v. Bitter Root Development Co.*, 200 U.S. 451, 478, 26 S. Ct. 318, 327, 50 L. Ed. 550 (1906). See, e.g., *Broderick v. American General Corp.*, 71 F.2d 864, 868 (4th Cir. 1934). None of the fiduciary or trust relationships giving rise to an obligation to account are present. See *American Air Filter Co. Inc. v. McNichol*, 527 F.2d 1296, 1300 (3d Cir. 1975); *Sulzer v. Watson*, 39 F. 414, 415 (C.C.B. Vt. 1889). Nor do the plaintiffs seek an accounting in the sense of disgorgement of "profits made from the unfair use of a plaintiff's trademark or tradename." *Robert Bruce, Inc. v. Sears, Roebuck & Co.*, 343 F. Supp. 1333, 1348 (E.D. Pa. 1972).

Accord, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540, slip op. at 25-26 (3d Cir. July 7, 1980). See also *In re U.S. Financial Sec. Litigation*, 609 F.2d at 424 (footnote omitted), in which the Ninth Circuit rejected the argument that securities fraud litigation was analogous to equitable accounting cases:

A suit for an "accounting" was a narrow and little-used ground for establishing equitable jurisdiction. The present actions do not involve any claims for an equitable accounting. The questions in this case are of a legal character traditionally heard at common law. The fact that a case may involve accounting principles cannot magically convert the legal causes of action into an action for an equitable accounting.

118. See generally Arnold, *supra* note 17. After thoroughly researching English equitable practice with respect to cases of account and other complex litigation, Professor Arnold concludes that "A diligent search of the available sources has not revealed any evidence of an eighteenth century American or English belief that complexity was a ground for the exercise of equitable jurisdiction. . . . There thus seems to be no good historical foundation for the argument that plaintiffs may be denied the right to a jury trial because their cases are complex." *Id.* at 848.

119. See, e.g., 5 MOORE, *supra* note 8, ¶ 38.25; 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2310 (1971); Belsham, *The Old Action of Account*, 45 HARV. L. REV. 466 (1932); Note, *Unfit for Jury Determination: Complex Civil Litigation and the Seventh Amendment Right of Trial by Jury*, 20 B.C. L. REV. 511, 527-29 (1979).

120. See, e.g., Devlin, *supra* note 12, at 66-67.

121. See, e.g., *id.* at 67; Note, *supra* note 119, at 528; Note, *The Right to a Jury Trial in Complex Civil Litigation*, *supra* note 5, at 905. American courts also recognized equitable jurisdiction for complicated matters of account, see, e.g., *Kirby v. Lake Shore & Michigan S. R.R.*, 120 U.S. 130, 134 (1887) ("The complicated nature of accounts between the parties constitutes itself a sufficient ground for going into equity. It would have been difficult, if not impossible, for a jury to



Commentators have searched for pre-1791 authorities that might reveal a widespread equitable practice of relieving juries of complex matters, other than in the narrow accounting cases. *Towneley v. Clench*,<sup>122</sup> a 1603 Chancery case, is occasionally cited as authority for this practice.<sup>123</sup> However, for a number of reasons, *Clench* simply cannot carry the burden of a general complexity exception to the Seventh Amendment. To be sure, the report<sup>124</sup> of this case notes that Lord Chancellor Ellesmere took equitable jurisdiction in a matter involving ancient books and records and indicated that "the Court was better able to judge than a jury of ploughmen."<sup>125</sup> But Professor Arnold has

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unravel the numerous transactions involved in the settlements between the parties, and reach a satisfactory conclusion. . . . 1 Story Eq. Juris. § 451. Justice could not be done except by employing the methods of investigation peculiar to courts of equity."). Modern procedural developments, however, may have greatly lessened equitable jurisdiction for accounting cases. Thus, the Court in *Dairy Queen Inc. v. Wood*, 369 U.S. 469, 478 (1962), noted that the possibility of appointing a Master pursuant to Federal Rules of Civil Procedure 53(b) make it "a rare case" in which "plaintiff [will] be able to show that the 'accounts between the parties' are of such a 'complicated nature' that only a court of equity can satisfactorily unravel them." See Note, *Incompetent Jury*, *supra* note 5, at 793-94; Note, *The Right to a Jury Trial in Complex Civil Litigation*, *supra* note 5.

122. 21 Eng. Rep. 13 (Ch. 1603). Because the Reporter, Cary, reversed the parties and misspelled the plaintiff's name, this case is often cited as *Clench v. Tomley*. For simplicity, this case will be referred to as *Clench* for the remainder of this Article.

123. See, e.g., *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 67 (S.D.N.Y. 1978); *In re U.S. Financial Sec. Litigation*, 75 F.R.D. 702, 708-09 (S.D. Cal. 1977), *rev'd* 609 F.2d 411 (9th Cir. 1979).

124. Professor Arnold observes that reports from this time period must be viewed with some caution.

In order to understand why it is so difficult to interpret [the *Clench*] report with real confidence it is first necessary to recall the nature of early seventeenth-century reporting. Reports in this period were in no sense "official"; indeed, official reports would not appear in England or America until well after the seventh amendment was adopted. Until then, the books printed as "reports" could have had several different original purposes: they might have been, as in the medieval Year-Book tradition, the notes of students present in court; or they might have been the notes of counsel or judges participating in the litigation. In no sense were they complete: not every case was reported, and not every aspect of reported cases received attention. Rarely was there anything resembling the opinions of modern American law reports.

Arnold, *supra* note 17, at 841 (citations omitted). See also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 917.

125. The entire report of Cary 23, 21 Eng. Rep. 13 (Ch. 1603) (emphasis in original) reads as follows:

*Inter Tomley [sic] and Clench*, it appeared by testimony of ancient witnesses speaking of sixty years before, and account books and other writings, that Francis Vaughan, from whom Tomley claimed, was *mulier* [i.e., legitimate]; and Anthony, from whom Clench claimeth, was a bastard; and the possession had gone with Tomley fifty years. In this case the Lord Egerton not only decreed the possession with Tomley, but ordered also that Clench should not have any trial at the common law for his right till he had shewed better matter in the Chancery, being a thing so long past; it rested not properly in notice *de pais*, but to be discerned by books and deeds, of which the Court was better able to judge then [sic] a jury of ploughmen, notwithstanding that exceptions were alleged against those ancient writings; and that for the copyhold land, the verdict went with Clench upon evidence given three days before Serjeant Williams that Anthony was *mulier* (31st May, 1 Jacob. 1603).

demonstrated from the actual chancery records in the Public Records Office in London that the basis for the Chancellor's jurisdiction was not the complexity of the matters involved. Instead, it was the more traditional and unremarkable ground that Towneley's remedy at common law was inadequate because the common law court could neither subpoena critical documents nor compel witnesses to appear.<sup>126</sup> Moreover, Lord Ellesmere's reported statement concerning the inappropriateness of a jury trial may well have been in response to the fact that the events central to the case were "so long passed" that "notice *de pais*"—oral testimony typically heard by juries—was not thought appropriate to establish the right to possession.<sup>127</sup> In that limited and unusual circumstance equity might grant jurisdiction. Finally, as Professor Arnold has observed, "Ellesmere's novel opinion was apparently never regarded as authority later, and there is no evidence that its principles, whatever they might have been, were ever again invoked."<sup>128</sup> Thus, it is fair to conclude that in 1791 equity did not intervene generally to deprive the common law courts of jurisdiction in matters that might involve complex documents or otherwise challenge the abilities of juries.<sup>129</sup>

126. Arnold, *supra* note 17, at 842-44.

127. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. at 918.

128. Arnold, *supra* note 17, at 845.

129. *Id.* Moreover, Professor Arnold notes that

*Towneley v. Clench* is so obscure that it had entirely escaped the notice of most commentators until recently, when it became necessary to ransack the old books in search of a distinguished parentage for what is really a relatively new idea—that a jury may be denied a plaintiff on the ground that the case is "too complex." The most recent scholarly look at the clash between law and equity in the seventeenth century does not even so much as mention the case.

*Id.* (footnote omitted). See also Arnold, *supra* note 22, at 988 ("But much more fundamentally, even if Ellesmere made the statement attributed to him . . . the case remains unique and without either precedent or progeny. It never was a basis for denying a jury to a plaintiff that complicated matters of law might arise in the course of a trial." (footnote omitted)).

Wedderburn v. Pickering, 13 Ch. D. 769 (1879), is occasionally cited as a companion to the *Clench* case. However, *Wedderburn*'s significance is extremely limited in view of the fact that it was decided in 1879, almost 90 years after the adoption of the Seventh Amendment, and it turned upon English statutes that had merged law and equity and altered the nature of jury trial in England. See Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, as amended Judicature Act, 1875, 38 & 39 Vict., c. 77; Order XXXVI, Rules 2, 3, 26, Rules of Court, 1875. As Judge Becker analyzed the matter:

Thus, the 1875 rules and the cases applying them do not support the proposition that complexity can make a "legal" issue into an "equitable" one. . . . We conclude that the English post-merger cases demonstrate only that the English used the relative difficulty of trying complex cases before juries as a limitation on the *extension* of jury trials to formerly equitable matters.

Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. at 916 (emphasis in original).

Devlin also cited *Blad v. Bamfield*, 3 Swans 604 (App.), 36 Eng. Rep. 992 (Ch. 1674), as support for equitable jurisdiction over complex matters. Devlin, *supra* note 12, at 75-76. However, as Professor Arnold demonstrates, *Blad* was properly in Chancery "because it was a trespass on the high seas and Chancery had Admiralty jurisdiction." Arnold, *supra* note 17, at 846. Moreover, because the case involved the validity of letters patent from the King of Denmark and a treaty between Denmark and England, Professor Arnold concludes that

### B. *The Ross v. Bernhard Approach*

Having established in *Ross* that the question of the right to jury trial should be approached on an issue-by-issue basis,<sup>130</sup> the Supreme Court enumerated, by dictum in a footnote, the relevant considerations in determining whether the right to jury trial is preserved for a particular issue: "first, the pre-merger custom with reference to such questions; second, the remedy sought and, third, the practical abilities and limitations of juries."<sup>131</sup>

The first two factors of the Court's footnote have generally been recognized as a restatement of the traditional historical test and a confirmation of its centrality as the means for categorizing issues to be tried to juries or judges.<sup>132</sup> But the third factor—the practical abilities and limitations of juries—has caused some confusion, because there is simply no precedent or authority for employing such a variable in Seventh Amendment analysis.<sup>133</sup> Not surprisingly, commentators have greeted *Ross* with a broad spectrum of opinion, ranging from heralding the *Ross* footnote as the dawning of a new era of "functional analysis," free from the constraints of history,<sup>134</sup> to arguing that the Court intended no modification at all of its historical test and that the third factor can safely be disregarded as having no constitutional significance.<sup>135</sup>

Courts have also expressed diverse views concerning the meaning to be accorded the *Ross* footnote.<sup>136</sup> But in four district court cases—In

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[t]his case stands for the simple proposition that suits involving foreign relations ought to be tried in prerogative courts: it is not the complexity of the case which renders it unsuitable for trial in a common-law forum, but the source of the rights claimed. . . . On any reading, the case gives slim support to the view that complexity is a reason for withdrawing a case from a jury.

*Id.*

130. See text accompanying notes 45-47 *supra*.

131. *Ross v. Bernhard*, 396 U.S. at 538 n.10.

132. Devlin, *supra* note 12, at 44. See also Wolfram, *supra* note 22, at 643-44; Note, *supra* note 119, at 518; Note, *The Right to a Jury Trial in Complex Civil Litigation*, *supra* note 5, at 911.

133. The court cited no cases or other authority to support the use of the third factor. The reference later in footnote 10 to Professor James' article, *Right to a Jury Trial in Civil Actions*, *supra* note 8, certainly is not supportive. Professor James accepts the historical test, *id.* at 664, and then writes at length how history should guide the determination of jury trial rights under a merged system of law and equity with uniform rules of civil procedure. *Id.* at 664-90.

134. See, e.g., Wolfram, *supra* note 22, at 744-47; Note, *The Right to a Jury Trial in Complex Civil Litigation*, *supra* note 5, at 904; Note, *Congressional Provision*, *supra* note 8, at 412-13.

135. See, e.g., C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 454 (3d ed. 1976); Redish, *supra* note 8, at 524-26; Note, *supra* note 119, at 533. See also Shapiro & Coquillette, *supra* note 26, at 449-50.

136. For cases discussing the issue of jury competence raised by the third prong of the *Ross* test, see, e.g., *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 225 & n.25 (4th Cir. 1978) (Federal Truth in Lending Act suit; jury granted after court questioned continued validity of the third prong of *Ross* test); *Pons v. Lorillard*, 549 F.2d 950, 953-54 (4th Cir. 1977), *aff'd on nonconstitutional grounds*, 434 U.S. 575 (1978) (jury granted following statutory construction of Age Discrimination in Employ-

re *Boise Cascade Securities Litigation*,<sup>137</sup> In re *U.S. Financial Securities Litigation*,<sup>138</sup> *Bernstein v. Universal Pictures, Inc.*,<sup>139</sup> and *ILC Peripherals Leasing Corp. v. IBM Corp.*,<sup>140</sup>—courts have taken the extreme position that the “practical abilities and limitations of juries” language in part three of the footnote establishes a wholly independent variable that may alone be sufficient to justify the denial of jury trials in complex cases. *Bernstein* and *ILC Peripherals*, both antitrust cases, exemplify well the kind of complexity that has encouraged some judges to seek refuge in the third factor of the *Ross* footnote as a means of denying jury trial.

*Bernstein* was a class action filed by sixty-five named plaintiffs, on behalf of a class of hundreds of lyricists and composers of music, against eleven defendants who allegedly conspired to restrain and monopolize trade by depriving plaintiffs of copyright music and lyrics that they had written for defendants’ motion pictures and television shows. The case promised to be long and complicated, largely due to numerous counterclaims, setoffs, and contract disputes between individual plaintiffs and defendants. Indeed, it was estimated that the named plaintiffs’ case-in-chief would require a minimum of four months and that the entire trial would involve over 100 witnesses, 12,000 exhibits, and 2,500 pages of accountants’ worksheets. After Judge Briant raised, *sua sponte*, the issue of a jury’s competence to handle the case, he struck plaintiffs’ jury demand on the basis of the “third prong” of the *Ross* test. The court held that, in light of the length and complexity of the trial, the case was “beyond the abilities of any jury to understand and decide with rationality.”<sup>141</sup>

*ILC Peripherals* also relied upon the third factor of the *Ross* test in striking a jury demand. This case, too, was unquestionably complicated and technically difficult. Plaintiffs ILC Peripherals Leasing Cor-

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ment Act); *Minnis v. UAW*, 531 F.2d 850, 852-53 (8th Cir. 1975) (breach of duty of fair representation by union; jury held to be competent to decide issues); *Farmers-Peoples Bank v. United States*, 477 F.2d 752, 756-57 (6th Cir. 1973) (wrongful tax levy; jury trial granted after considering jury’s competence); *SEC v. Associated Minerals, Inc.*, 75 F.R.D. 724, 725-26 (E.D. Mich. 1977) (jury denied in securities fraud action seeking injunctive relief and disgorgement of profits).

Other courts have cited *Ross* but have disposed of the jury demand without reaching the jury competence factor of the *Ross* footnote. See, e.g., *Dawson v. Contractors Transp. Corp.*, 467 F.2d 727, 731 (D.C. Cir. 1972) (jury granted on a crossclaim for contribution in a negligence suit; equitable nature of remedy emphasized); *General Tire & Rubber Co. v. Watson-Bowman Assocs.*, 74 F.R.D. 139, 140-41 (D. Del. 1977) (jury denied in patent infringement suit where fraud was alleged; fraud treated as an equitable issue).

137. 420 F. Supp. 99, 105 (W.D. Wash. 1976).

138. 75 F.R.D. 702 (S.D. Cal. 1977), *rev’d*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1866 (case 3) (1980).

139. 79 F.R.D. 59 (S.D.N.Y. 1978).

140. 458 F. Supp. 423 (N.D. Cal. 1978).

141. *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. at 66-67.

poration and Memorex Corporation had sued IBM for allegedly monopolizing several different markets and submarkets in the general business computer industry. Resolution of the issues in the case would require a sophisticated understanding of the economics of the computer industry, computer technology, and financing principles. Judge Conti originally denied IBM's motion to strike plaintiff's jury demand, and the case went to trial. After a full trial on the merits lasting over five months, a mistrial was declared when the jury deadlocked after nineteen days of deliberation. A directed verdict was then granted in favor of IBM and, at the same time, plaintiffs' jury demand was struck, in the event the case were eventually remanded for a new trial after an appeal. Notwithstanding the fact that Judge Conti believed that under parts one and two of the *Ross* test the issues presented by the litigation were traditionally legal and triable to a jury,<sup>142</sup> his experience with the first jury trial caused him to embrace part three of the *Ross* test as an independent basis for denying the right to jury trial.<sup>143</sup>

More recently, however, attempts to infer a general complexity exception to the Seventh Amendment have been rejected by the Ninth Circuit Court of Appeals in *In re U.S. Financial Securities Litigation*<sup>144</sup> and by the Third Circuit in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*<sup>145</sup> Both cases were as complex and difficult as *Bernstein* and *ILC Peripherals*.

In *U.S. Financial Securities* the district court, relying upon the third factor of the *Ross* footnote, had granted motions to strike demands for a jury trial, because the court believed this particular securities fraud litigation was beyond the capabilities of a jury. At the time of the district court's order, there were eighteen consolidated actions, many involving multiple plaintiffs and defendants. It was estimated that the trial itself would require two years and would involve over 100,000 pages of evidence and the testimony of numerous witnesses in an effort to sort out and understand the financial statements and accounting procedures of the defendants over a period of some six years.<sup>146</sup>

In *Zenith*, plaintiffs filed an antitrust action against twenty-four defendants in Japan and the United States for allegedly conspiring to take over the American electronic consumer products industry (televi-

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142. *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. at 445.

143. *Id.* at 447-48 ("[T]he court hereby finds that the magnitude and complexity of the present lawsuit render it, as a whole, beyond the ability and competency of any jury to understand and decide rationally, and orders, in the event of a remand for trial, that [plaintiffs'] jury demand be stricken.").

144. 609 F.2d 411 (9th Cir. 1979).

145. No. 79-2540 (3d Cir. July 7, 1980).

146. *In re U.S. Financial Sec. Litigation*, 75 F.R.D. at 706-08.

sion receivers, radios, phonographs, tape and audio equipment, and electronic components) by artificially lowering export prices for more than thirty years. Plaintiffs also identified an additional one hundred co-conspirators. The defendants responded by asserting various counterclaims, including claims that plaintiffs themselves had violated the antitrust laws. At the time the question of plaintiffs' right to jury trial was raised, this complicated litigation had already generated over twenty million documents for inspection, scores of depositions comprising over 100,000 pages of transcript, and waves of interrogatories and responses. The parties estimated that the case would take at least one year to try.<sup>147</sup>

Notwithstanding the manifest complexity of these two cases, the "practical abilities and limitations of juries" were not considered adequate grounds for denying jury trial. Several sound reasons support this conclusion. First, if part three of the *Ross* footnote is viewed as an elaboration of the historical test, that test reveals that equity considered the abilities of jurors and provided jurisdiction in complex cases only when complex matters of account were involved.<sup>148</sup> So viewed, *Ross* provides no more basis for a generalized complexity exception than the historical test itself.<sup>149</sup>

Second, as noted by other commentators,<sup>150</sup> the *Ross* footnote itself is dictum and a most unlikely vehicle for stating a new rule of constitutional dimension that radically departs from a two-hundred-year-old practice of approaching the Seventh Amendment on a historical basis.<sup>151</sup> Moreover, even if the Court had intended such a depar-

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147. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 892-95.

148. *In re U.S. Financial Sec. Litigation*, 609 F.2d at 423-24; *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 907-14; *Van Erman v. Schmidt*, 374 F. Supp. 1070, 1075 (W.D. Wis. 1974).

149. See text accompanying notes 115-18 *supra*.

150. See, e.g., C. WRIGHT, *supra* note 135, at 454; Redish, *supra* note 8, at 526 ("[T]he footnote is so cursory, conclusory and devoid of cited authority or reasoned analysis that it is difficult to believe that it could have been intended to reject such established historical practice or Supreme Court precedent."); Wolfram, *supra* note 22, at 645 ("Standing as it does, thus alone, this fleeting expression in *Ross v. Bernhard* of infidelity to the centrality of the traditional historical test in seventh amendment determinations would hardly justify an announcement that the historical test has been superseded in the federal courts."); Note, *supra* note 75, at 130.

151. *In re U.S. Financial Sec. Litigation*, 609 F.2d at 425 ("While it is unclear as to what was meant by the inclusion of the third factor, we do not believe that it stated a rule of constitutional dimensions. After employing an historical test for almost two hundred years, it is doubtful that the Supreme Court would attempt to make such a radical departure from its prior interpretation of a constitutional provision in a footnote."); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 926-27 ("It would be at least unusual for the Supreme Court to announce a new rule of constitutional magnitude in dicta, in a footnote, and unsupported by any explanation or citation of authority. The use of such means to modify *sub silentio* a rule of constitutional interpretation that has been consistently followed for decades, if not centuries, would be even more unusual." (footnote omitted)).

ture, it would have been only on an issue-by-issue basis, as articulated in *Ross*, and not the case-as-a-whole basis adopted by the district courts in *Boise Cascade Securities*, *U.S. Financial Securities*, *Bernstein*, and *ILC Peripherals*.<sup>152</sup>

Third, the Supreme Court's own decisions following *Ross* do not support a significant or independent role for part three of the *Ross* footnote.<sup>153</sup> In subsequent cases the Court has quite clearly and deliberately decided jury questions solely on the basis of traditional historical analysis, without any mention of the "practical abilities and limitations of juries."<sup>154</sup>

*Curtis v. Loether*,<sup>155</sup> for example, gave the Court its first opportunity after *Ross* to decide a Seventh Amendment question of jury trial right. Plaintiff had instituted an action under the Fair Housing provisions of the Civil Rights Act of 1968,<sup>156</sup> alleging that defendants racially discriminated in the rental of an apartment. When defendants demanded a jury trial, plaintiff objected on the grounds that jury trial was not authorized by the statute nor required by the Seventh Amendment.<sup>157</sup> Noting the sparse legislative history on the question of statutory right to jury trial, the Supreme Court held that under the Seventh Amendment either party had a right to jury trial of the issues involved in a housing discrimination suit.<sup>158</sup>

After first acknowledging that "[t]he Seventh Amendment [applies] to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies enforcea-

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152. *In re U.S. Financial Sec. Litigation*, 609 F.2d at 426 ("Another factor which militates against our adoption of a new interpretation of the Seventh Amendment is our belief that it would be totally at odds with prior Seventh Amendment experience. To consider the practical abilities and limitations of juries within the context of complex cases would necessitate an examination of the whole case. However, the Seventh Amendment right has never been made dependent upon such an examination; it has always been the nature of the issue." (footnotes omitted)); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 934 ("The use of the *Ross* footnote as a test would therefore place on the party seeking a non-jury trial the burden of showing that *each* otherwise legal claim or issue in the case was too complex for a jury, with the right to a jury trial, including the preclusive effect of the jury's findings on any common issues of fact, preserved for all issues as to which that burden is not met. The defendants here have made no attempt to meet such a burden.").

153. Indeed, even in the *Ross* case itself, the Supreme Court did not include part 3 of the *Ross* footnote in its analysis or as a basis for its decision.

154. *In re U.S. Financial Sec. Litigation*, 609 F.2d at 426; *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 926-29; see Kane, *supra* note 8, at 20-31, 33-35; Note, *The Seventh Amendment: A Return to Fundamentals*, 10 URBAN L. ANN. 313, 315 (1975).

155. 415 U.S. 189 (1974).

156. 42 U.S.C. §§ 3601-3631 (1970 & Supp. VI 1974).

157. The district court agreed with the plaintiff and struck defendant's demand for jury trial. The court of appeals reversed. 467 F.2d 1110 (7th Cir. 1972).

158. *Curtis v. Loether*, 415 U.S. at 191-92.

ble in an action for damages in the ordinary courts of law,"<sup>159</sup> the Court proceeded to apply a traditional historical analysis and concluded that defendant had a right to jury trial. The Court emphasized that "this cause of action is analogous to a number of tort actions recognized at common law"<sup>160</sup> and that the "relief sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law."<sup>161</sup>

The Court neither mentioned "the practical abilities and limitations of juries" nor balanced that factor against its historical findings. This silence is particularly significant because the Court of Appeals had expressly considered part three of the *Ross* test,<sup>162</sup> and the plaintiff had clearly placed the issue of jury competence before the Supreme Court by arguing that jury trials in fair housing cases would cause unnecessary delay and subject plaintiffs to a high risk of jury prejudice.<sup>163</sup> In response, the Court noted that, "We are not oblivious to the force of petitioner's policy arguments. . . . [H]owever, these considerations are insufficient to overcome the clear command of the Seventh Amendment."<sup>164</sup>

Similarly, in *Pernell v. Southall Realty*<sup>165</sup> the Supreme Court relied wholly on the historical test in determining the right to jury trial. In *Pernell*, a landlord had brought a statutory action to evict a tenant for alleged nonpayment of rent.<sup>166</sup> The defendant denied the allegations of nonpayment, raised counterclaims and a setoff, and demanded a jury trial.<sup>167</sup> Once again, faced with meager legislative history on the statutory question of jury trial, the Court reached the Seventh Amendment question and upheld the defendant's demand. Carefully tracing the historical development of several types of possessory actions, the Court held that "[t]he various forms of action which the common law developed for the recovery of possession of real property were also actions at law in which trial by jury was afforded."<sup>168</sup> Since the District of Columbia statute was analogous to a common law writ of posses-

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159. *Id.* at 194.

160. *Id.* at 195.

161. *Id.* at 196. What particular issues were to be jury tried or judge tried was not a question raised by the parties or addressed by the Court.

162. *Rodgers v. Loether*, 467 F.2d 1110, 1116-18 (7th Cir. 1972), *aff'd on other grounds sub nom. Curtis v. Loether*, 415 U.S. 189 (1974).

163. *Curtis v. Loether*, 415 U.S. at 198.

164. *Id.*

165. 416 U.S. 363 (1974).

166. "Suit was brought under D.C. Code §§ 16-1501 through 16-1505, which establishes a procedure for the recovery of possession of real property." *Pernell v. Southall Realty*, 416 U.S. at 364.

167. *Id.* at 364-65.

168. *Id.* at 371.



sion, involved the same issues, and served the same essential function as that writ,<sup>169</sup> the right to jury trial was held to be preserved by the Seventh Amendment. As the Court put it:

Had Southall Realty leased a home in London in 1791 instead of one in the District of Columbia in 1971, it no doubt would have used ejectment to seek to remove its allegedly defaulting tenant. And, as all parties here concede, questions of facts arising in an ejectment action were resolved by a jury.<sup>170</sup>

Once again, it is noteworthy that the Court resolved the jury trial question without reference to the "practical abilities and limitations of juries," notwithstanding the fact that that issue had been discussed by the Court of Appeals and argued strenuously by the plaintiff to the Supreme Court.<sup>171</sup>

Finally, creating a complexity exception from the bare bones of part three of the *Ross* footnote confers an unwarranted and unbounded decisionmaking power upon trial judges.<sup>172</sup> In virtually every case in which a jury trial is demanded, the potential exists for challenging the jury demand on the ground that the jury is not competent or that the jury mode of trial is inefficient.<sup>173</sup> It could be years before standards

169. *Id.* at 372-73.

170. *Id.* at 373-74. Note that because of the parties' concession, it was not necessary to employ the second stage of historical analysis.

171. Although the Court in *Pernell* does not explicitly refer to the *Ross* consideration of the practical limitations of a jury, the Court does dismiss the argument that jury trial would burden statutory eviction suits with delay and cumbersome procedures. 416 U.S. at 383-85. Due process is served, the Court writes, if both parties have "a fair opportunity to present their cases." *Id.* at 385.

The District of Columbia Court of Appeals had ruled against jury trial in these cases, partly because of the volume and complexity of landlord-tenant disputes, and suggested that jury trial in this context was unfair and overly burdensome. See 294 A.2d 490 (D.C. 1972). These concerns would seem to be encompassed by the *Ross* footnote, and the Supreme Court's terse rejection of the practical limitations argument, particularly after it had been raised by the appellate court, may be read as an offhand devaluation of the last factor of the *Ross* test.

In addition, although the more recent cases of *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977), and *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), do not raise the precise question of whether or not a particular issue should be jury tried, the Court in these cases readily acknowledged the primary importance of the historical test for determining the scope of the Seventh Amendment right to jury trial. *Atlas Roofing Co. Inc. v. Occupational Safety and Health Review Comm'n*, 430 U.S. at 449; *Parklane Hosiery Co. v. Shore*, 439 U.S. at 333-37. The "practical abilities and limitations of juries" are not mentioned at all, nor is there any hint that the Court intends to abandon its historical approach for a more ad hoc, functional test.

172. The Supreme Court gave absolutely no parameters for application of part three of the *Ross* footnote. Lower courts have struggled gamely, but have not developed a consistent approach. See text accompanying note 136 *supra*; see, e.g., *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 931-34; *Radial Lip Machine, Inc. v. International Carbide Corp.*, 76 F.R.D. 224, 227 (N.D. Ill. 1977). See also C. WRIGHT, *supra* note 135, at 454; Note, *supra* note 119, at 518.

173. See, e.g., Note, *supra* note 119, at 519-20.

were developed and consensus reached concerning the meaning of "the practical abilities and limitations of juries" and the circumstances in which that criterion alone might justify denial of a jury trial.<sup>174</sup> These concerns seem to justify Professor Wolfram's apprehensions about "the spectre of federal judges using a disturbingly broad discretion in their

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174. Although there appears little support for a *Ross* "test," were a court insistent upon using *Ross*, a *sequential* approach to the *Ross* footnote's three factors might have merit. Under such an approach, a court first would separate the issues presented in an antitrust action. See text accompanying notes 45-47 *supra*. The three factors enumerated in the *Ross* footnote would then be applied sequentially to each issue in turn, to determine whether a constitutional right to jury trial attaches to an issue. If the first factor is capable of resolving the jury trial question, then it would be unnecessary to proceed to the next factor in sequence.

The first factor, the traditional historical search for precedents or analogues, might well dispose of the jury right. If the precedent or analogue clearly indicates that such an issue was tried by a jury in 1791, *Ross* can be read to mandate a similar judge-jury division of labor in a modern case. 369 U.S. at 538 n.10; see Shapiro & Coquillette, *supra* note 26, at 445-46 (the historical test is primary and should not be overridden by practical concerns if jury decision on an issue has a clear historical basis). For example, since the Court concluded that historical inquiry clearly answered the question whether a jury trial was available in *Curtis v. Loether*, 415 U.S. 189 (1974) and *Pernell v. Southall Realty*, 416 U.S. 363 (1974), the Court's failure to discuss the second and third *Ross* factors might be explained by the fact that the first factor was adequate to dispose of the jury trial question.

In some cases, however, the historical analysis will not clearly support or deny a right to jury determination of an issue. The second *Ross* factor, examining "the remedy sought," might then be employed where the historical analysis is indecisive or the issues are newly created by Congress or the courts. Under this approach, if a party requests a form of relief, such as money damages, traditionally tried to juries, then a presumption should arise that all liability issues leading to damages will be tried to a jury. Conversely, if the party seeks an injunction or other equitable remedy, then it would be presumed that the court would decide all related liability issues. In the former instance, where the second *Ross* factor has raised a presumption *favoring* jury trial, the party moving to strike a jury trial demand should then be permitted to introduce evidence of jury incompetence or inefficiency with respect to the issue in question, subject to rebuttal. The court would weigh these practical concerns, which constitute the third *Ross* factor, giving attention to the level of education and sophistication needed to understand the issue, the type and quantity of evidence that would be presented to the trier of fact, the difficulty of any expert testimony likely to be given, and the length of time needed to develop the issue at trial.

A sequential application of the *Ross* factors, such as that described above would involve many fewer cases in the ad hoc decisionmaking illustrated by *Bernstein* and *ILC Peripherals*, where the practical ability of the jury was treated as an independent variable. The sequential approach would resort to the balancing of practicalities only when the historical test was indecisive *and* the remedy sought was traditionally legal. Moreover, a court applying the third factor in a sequential analysis can reduce the level of judicial discretion by assessing jury competence with respect to generic issues, such as market definition in an antitrust action, rather than on a case-by-case basis that necessarily increases uncertainty and consumes judicial resources. For example, in *Radial Lip Machine, Inc. v. International Carbide Corp.*, 76 F.R.D. at 227, although the court treated the three *Ross* factors as elements in a balancing test rather than sequentially, it did take a generic approach to the issues: "Once the court finds that the nature of an issue is basically legal, the right to a jury trial exists for that entire class of claims. The portion of the *Ross* test which weighs the practical abilities and limitations of juries contemplates a general analysis of the problems typically presented by those claims, not a specific case-by-case analysis of the complexity of the litigation." Combining a sequential approach, which limits the number of cases in which the court must examine the practical limits of jury decisions, with a generic approach to the question of jury competence over particular issues is likely to produce an accepted body of opinion with some predictability. This combined approach would limit discretion, increase certainty,

determination of whether a jury ought to be interposed in particular cases."<sup>175</sup>

In sum, a complexity exception to the right to jury trial raises serious policy concerns and is not historically justified, as the Seventh Amendment requires it to be. Further, the Supreme Court has given no indication of raising the *Ross* footnote as the head of a new line of analysis. Rather, it has reaffirmed that the historical test is decisive.

### III

#### APPLYING THE HISTORICAL APPROACH TO ANTITRUST ISSUES

The first stage of traditional historical Seventh Amendment analysis requires a broad cut to be made along law/equity lines to determine whether an entire matter would have been considered equitable in England in 1791 and therefore triable to a judge today.<sup>176</sup> Evidence of English practice, however, fails to indicate the existence of specific equitable causes of action analogous to modern antitrust litigation. And, as previously noted, there is no credible evidence supporting equitable jurisdiction generally over complex matters, such as antitrust litigation.<sup>177</sup> Of course, if a plaintiff requests only equitable relief in an antitrust action, it may be tried to a judge, because equitable relief was administered only by the chancellor in England in 1791.<sup>178</sup> But such cases are not the norm. In the typical private antitrust suit, the plaintiff requests compensatory damages and the penalty of treble damages, relief traditionally administered at common law.<sup>179</sup> Thus, to the extent antitrust litigation is to be broadly categorized under first-stage historical analysis, it is appropriately considered legal, and therefore generally cognizable in a court of common law.<sup>180</sup>

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and avoid the more radical nature of a general complexity exception. And it would accord some meaning to the Court's language in *Ross* concerning the "abilities and limitations of juries."

To be sure, the Court did not detail such a sequential approach in setting out the three factors listed in the *Ross* footnote, and it appears clear from subsequent decisions that the Court intends to follow a historical rather than a functional analysis in any event. But if *Ross* were to be revitalized in some capacity in the future, the sequential strategy offers distinct advantages and is not inconsistent with post-*Ross* decisions that ignore the other two factors once the historical test resolves the question of a party's right to jury decision on an issue.

175. Wolfram, *supra* note 22, at 644.

176. See text accompanying notes 26-28 *supra*.

177. See text accompanying notes 115-29 *supra*.

178. See, e.g., J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 87-89 (2d ed. 1979).

179. See, e.g., *Fleitmann v. Welsbach St. Lighting Co.*, 240 U.S. 27 (1916); *Decorative Stone Co. v. Building Trades Council*, 23 F.2d 426, 427-28 (2d Cir.), *cert. denied*, 277 U.S. 594 (1928); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 921-22; 5 MOORE, *supra* note 8, ¶¶ 38.19[2], 38.37[2], at 165-66, 323-26.

180. *Fleitmann v. Welsbach St. Lighting Co.*, 240 U.S. 27 (1916).

This broad categorization, however, does not imply that antitrust suits in their entirety must be tried to a jury. To be sure, English common law courts employed juries in 1791. But the second stage of historical analysis requires further inquiry to determine which antitrust issues (or their analogues, if they existed) were tried to a jury and which to a judge under English law.<sup>181</sup> Only those issues tried historically by juries are preserved by the Seventh Amendment for jury trial today.<sup>182</sup>

In order to carry out second-stage historical analysis, it is necessary to determine what issues exist in modern antitrust litigation. Then English history must be searched to determine how decisionmaking with respect to those issues or their analogues was allocated between judge and jury. The next part of this section will describe the substantive issues that may arise in modern antitrust cases. The following part will discuss the relative significance of those issues in various types of antitrust cases. Then, finally, English history will be examined for parallels to these issues.

### A. Modern Antitrust Issues

Congress enacted the antitrust laws to maintain competition and competitive markets in order to secure for the public an environment in which the welfare of consumers is maximized through the rational and efficient allocation of resources, consistent with the preservation of entrepreneurial opportunity and limitations upon excessive aggregations of political and economic power.<sup>183</sup> The primary statutes carrying out

181. See text accompanying notes 29-33 *supra*.

182. Because the defendants in *Zenith* had conceded that the Seventh Amendment applies to all but the most lengthy and complex damage actions, Judge Becker did not feel compelled "to engage in the extensive historical analysis which would be required to determine conclusively the question of the applicability of the Seventh Amendment to antitrust actions." Thus, he conducted no issue-by-issue analysis of jury trial issues in antitrust cases. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 906-07 n.29. Now that the case has been remanded, *Matsushita Elec. Indus. Co.*, No. 79-2540 (3d Cir. July 7, 1980), Judge Becker has the opportunity to engage in such second-stage Seventh Amendment analysis. See text accompanying notes 397-410 *infra*.

183. See, e.g., L. SULLIVAN, *supra* note 1, § 1, at 10, § 5, at 20-21; W. SHEPHERD, *THE TREATMENT OF MARKET POWER* 3, 5, 183-224 (1975); Dougherty & Davidson, *Limitation Without Regulation: The FTC's Bureau of Competition Approach to Conglomerate Mergers*, 1980 UTAH L. REV. 95; Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust: An Introduction*, 125 U. PA. L. REV. 1182 (1977); Joffe, *Beyond Antitrust*, 28 CATHOLIC U.L. REV. 1 (1978); Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1066 (1979); Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076 (1979); Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214 (1977); Brodley, Book Review, 24 STAN. L. REV. 1155 (1972); Dewey, Book Review, 87 YALE L.J. 1516 (1978); First, Book Review, 52 N.Y.U. L. REV. 947 (1977); Scherer, Book Review, 86 YALE L.J. 974 (1977).

This broad view of antitrust goals is disputed by some commentators who argue that "economic efficiency" should be the sole goal of antitrust. See, e.g., R. BORK, *supra* note 1; R. Pos-

these objectives are the Sherman Act<sup>184</sup> and the Clayton Act,<sup>185</sup> which include prohibitions against monopolization and unreasonable restraints of trade, and certain mergers, exclusive dealing arrangements, requirements contracts, and tie-ins. While the specific antitrust statutes may vary in terms, there are basically three sets of substantive issues that may arise in antitrust litigation: Market structure issues, firm conduct issues, and injury and damages issues.<sup>186</sup> The relative significance of an issue may vary in the context of one particular offense or another, and on occasion the line between issues may blur, but on the whole this particular division of issues in antitrust litigation finds support in the case law and legal commentary and in the common antitrust parlance of practitioners, judges, and academics.<sup>187</sup>

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NER, *supra* note 1. For a more recent adoption of this position, see 1 P. AREEDA & D. TURNER, *supra* note 4, ¶¶ 103-13. *But compare* C. KAYSER & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 4-5, 11-22, 44-46 (1959); Turner, *The Principles of American Antitrust Laws*, SUPP. NO. 6, INT'L & COMP. L.Q. 1, 5-6 (1963).

184. Sherman Act, ch. 647, §§ 1-7, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-7 (1976)).

185. Clayton Act, ch. 322, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12-27 (1976)).

186. Issues of standing and interstate commerce requirements may also present in some cases, but traditionally these have been considered jurisdictional issues and have been decided by the court without the aid of a jury. *See, e.g.*, 2A MOORE, *supra* note 8, ¶ 8.11[11] n.17; 5 MOORE, *supra* note 8, ¶¶ 38.36[2], 38.38[4]. *See also* note 211 *infra*.

187. Defining an "issue" offers potential difficulties. Separate treatment of discrete "issues" is important in numerous contexts, including FED. R. CIV. P. 16 (formulating issues in pretrial procedure), 38(c) (specification of issues for jury trial), and 42(b) (separate trial on discrete issues), and in pendent and ancillary jurisdiction questions. *See, e.g.*, *Ellingson Timber Co. v. Great N. Ry. Co.*, 424 F.2d 497 (9th Cir.), *cert. denied*, 400 U.S. 957 (1970) (trial court has discretion under Rule 42(b) to separate issues in order to defer costly and possibly unnecessary discovery); C. WRIGHT & A. MILLER, *supra* note 21, § 2387. Yet little guidance is offered by the courts on determining how to separate issues.

Wright and Miller observe that "Rule 42(b) is sweeping in its terms and allows the court, in its discretion, to grant separate trial of any kind of issue in any kind of case." *Id.* § 2389, at 284. *See* cases collected at *id.* § 2389 & nn.21, 32, and Supp. 1980 § 2389 for examples of "issues." In *Reliable Volkswagen Sales & Service Co. v. World-Wide Auto. Corp.*, 34 F.R.D. 134 (D.N.J. 1963), the court denied separate trial because of "inextricably interwoven" evidence, but recognized the determination of relevant market as an "issue." Similarly, the court in *United States v. IBM Corp.*, 60 F.R.D. 654 (S.D.N.Y. 1973), treated market definition as an issue, but denied separate trial on this issue because it would not materially advance the litigation. (Of course, if a structural issue like this is treated as a nonjury question, as this Article proposes, early determination by the court *would* expedite or even dispose of the litigation.) Finally, note that damages are often separated as an "issue." *See* C. WRIGHT & A. MILLER, *supra* note 21, § 2390; antitrust cases collected at note 215 *infra*.

We can probably do no better in most circumstances than to discuss issues in a logical manner that appeals to common sense and judicial usage. Thus, it seems appropriate to define and separate issues along the lines suggested by court opinions, legal commentary, and the common experience of practitioners concerning a given substantive area of the law. At least this seems workable and most appropriate in circumstances where Congress has not identified separate issues in the statutes that it enacts.

### 1. *Structure Issues*

Structural issues in modern antitrust litigation attempt to set the stage for evaluating and placing in context the alleged anticompetitive conduct of a defendant.<sup>188</sup> The main structural issues are relevant market definition, industry concentration levels, firm market share, and firm power.<sup>189</sup> These concepts are economic in character and draw upon price theory and industrial organization economics for their content. Their complexity makes expert testimony indispensable in the typical antitrust case.

Relevant market definition requires the trier of fact to ascertain the relevant product and geographic markets in which the defendant competes.<sup>190</sup> The process involves a consideration of complex and in-

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188. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 321-22 (1962). Interestingly, business strategic planning literature also recognizes the importance of market structure as a key to understanding the dynamics of competition. See, e.g., M. PORTER, *COMPETITIVE STRATEGY* (1980).

189. Professor Sullivan has described the complexity of market structure issues:

Structure is the term which describes the way the market is organized, the basic characteristics which are likely to persist over a substantial period of time. Market structure thus includes the degree of concentration—the number and size distribution of firms producing a particular product or range of products. It includes the extent to which the product of one firm is differentiated in the mind of the consumer from that of other firms and the manner in which differentiation is achieved (whether through functional differences between the products of one manufacturer and another, through stylistic differences, or merely through advertising of a brand name). Market structure also includes the extent to which the products of firms in an industry are diversified, and the variety and technological complexity of products. Further, structure includes the extent to which firms are integrated vertically—that is, the extent to which successive stages in the production and distribution process are performed by a single firm. It includes, too, the nature of cost conditions—whether fixed costs are relatively high and variable costs relatively low, as in the railroad and some other utility industries, or whether variable costs are relatively high and fixed costs relatively low, as in many manufacturing industries. . . .

Additionally and most importantly, structure includes the character of any barriers to entry of new firms into the industry. Such barriers may result from various causes: license requirements, concentrated ownership of scarce resources such as ore, economies of scale which cause per unit costs of a firm whose output is small relative to total industry output to be significantly higher than the per unit costs of a firm producing a substantial percentage of total industry output, and concentration of control of patents or secret technology.

L. SULLIVAN, *supra* note 1, § 6, at 24-25.

190. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962); *Standard Oil Co. v. United States*, 337 U.S. 293, 299-300 n.5 (1949); *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co.*, 293 U.S. 268, 278-79 (1934).

In addition to the two elements of relevant product and geographic markets, Professors Areeda and Turner would seem to add a "production dimension" to relevant market definition. 2 P. AREEDA & D. TURNER, *supra* note 4, ¶ 517. Production dimension is defined as the products that are or can be manufactured with the same production facilities, or in other words, supply elasticity or substitutability. *Id.* at ¶¶ 517, 519b. Perhaps, as a theoretical matter, properly identified and proven supply substitutability may well restrict a firm's ability to raise price or restrict output, and therefore would be an appropriate consideration in defining the relevant market in which a firm effectively competes. As a practical matter, however, the Areeda and Turner proposal to consider this issue in market definition has the potential for great mischief unless the bur-

terrelated factors to determine whether the defendant could raise prices appreciably or curtail production substantially without competing goods promptly entering the market to restore a more competitive price or volume. "A relevant market," as Professor Sullivan observes, "is the narrowest market which is wide enough so that the products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market."<sup>191</sup>

Once the relevant product and geographic markets are defined, the next structural issues of concern are the concentration levels in the industry and the defendant's market share within that industry.<sup>192</sup> A firm's individual market share is probably the most critical issue: if it is sufficiently large, it may lead to a presumption of market power or a *prima facie* case of liability.<sup>193</sup> Industrywide concentration levels are also significant. As they increase, a firm's individual market share or conduct is likely to be viewed more critically, because firm interdepen-

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dens of production and persuasiveness concerning supply substitutability are clearly and firmly placed upon the defendant, who is in the best position to have knowledge of the ability of other firms to produce similar products. Moreover, even when introduction of such evidence by a defendant is permitted only in rebuttal to plaintiff's *prima facie* market definition, supply substitutability evidence should be limited to instances where alternative suppliers have *actually* supplied the product in question within a recent time period. This approach will help eliminate unnecessary speculation from the question of market definition. *See, e.g.,* United States v. Columbia Steel Co., 334 U.S. 495 (1948); Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347, 1368 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 691 (9th Cir. 1976), *cert. denied*, 429 U.S. 940 (1977); United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958).

191. L. SULLIVAN, *supra* note 1, § 12, at 41. *See also* 2 P. AREEDA & D. TURNER, *supra* note 4, ¶¶ 517-28.

In defining relevant markets, courts have employed concepts of cross-elasticity of demand, *see, e.g.,* Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394-95 (1956), elasticity of supply, *see, e.g.,* United States v. Columbia Steel Co., 334 U.S. 495, 510-11, 527 (1948); Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 691 (9th Cir. 1976), *cert. denied*, 429 U.S. 940 (1977), and barriers to entry, *see, e.g.,* United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). Courts have found it appropriate to measure sales, price, and purchasing patterns; transportation costs; and customer convenience and preferences. *See* 2 P. AREEDA & D. TURNER, *supra* note 4, ¶¶ 521-24. Often dynamic as well as static measurements are made. *See id.* ¶ 505; *see, e.g.,* Greyhound Computer Corp. v. IBM Corp., 559 F.2d 488, 496-97 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978), ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. at 430. Courts have also examined "such practical indicia" as industry and public recognition of markets, unique product characteristics and uses, unique production facilities, distinct prices, sensitivity to price changes, and the use of specialized vendors for a product. *See, e.g.,* Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); Dougherty, *Elimination of the Conduct Requirement in Government Monopolization Cases*, 48 ANTITRUST L.J. 869, 882 (1979); Stein & Brett, *Market Definition and Market Power in Antitrust Cases—An Empirical Primer on When, Why and How*, 24 N.Y. L. SCHOOL L. REV. 639, 663-68 (1979).

192. *See* 2 P. AREEDA & D. TURNER, *supra* note 4, ¶¶ 520, 527.

193. For example, if a firm possesses an individual market share of 90%, monopoly power will be presumed under § 2 of the Sherman Act. United States v. Aluminum Co. of America (ALCOA), 148 F.2d 416, 424 (2d Cir. 1945). *See also* United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (inferring monopoly power from an 87% market share).

dence and the opportunity for collusive behavior increase as concentration levels rise.<sup>194</sup>

Finally, in modern antitrust litigation, structural analysis is ordinarily the basis for establishing a firm's market power.<sup>195</sup> Market power has been defined as "the ability to raise prices by restricting output."<sup>196</sup> It inevitably involves problems of degree and duration.<sup>197</sup> It is measured today on the basis of inferences drawn from structural evidence of a firm's share of a relevant product and geographic market, industrywide concentration ratios, and the relative height of barriers to entry into the market.<sup>198</sup> Although theoretically, at least, it might be possible to demonstrate a firm's market power with evidence of conduct such as predatory actions,<sup>199</sup> excessive returns,<sup>200</sup> price-cost margins,<sup>201</sup> or price discriminations,<sup>202</sup> courts have almost always—and wisely—eschewed such an approach because the available proof is too speculative or difficult to appraise.<sup>203</sup> As Professors Areeda and Turner have concluded, "[c]onduct, in short, will rarely if ever establish market

194. See, e.g., *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); L. SULLIVAN, *supra* note 1, § 204, at 620-21. The Justice Department, for example, has indicated that it is unlikely to initiate suit against a horizontal merger between firms accounting for less than 10% of a market if the shares of the four largest firms in the market comprise less than 75% of the market. However, the Department may initiate proceedings against a merger between firms accounting for only 8% of the market if the four-firm concentration ratio exceeds 75%. See *Justice Department Guidelines* §§ 5, 6 (1968), reprinted in [1974] 1 TRADE REG. REP. (CCH) ¶ 4510.

195. Professor Sullivan has noted the evolution toward market structure as the determinant of market power:

Monopoly power has been defined as power to control price or to exclude competition. . . . The early cases, strongly oriented toward conduct and focusing upon the ethical quality of defendants' acts, found monopoly only where significant power was manifested by its predatory exercise. In recent years courts exploring issues of single firm power have drawn insight from economic theory and sought to utilize some of the analytical techniques of economists. The principle device used has been a simplified structural analysis.

L. SULLIVAN, *supra* note 1, § 9, at 33 (footnotes omitted).

196. 2 P. AREEDA & D. TURNER, *supra* note 4, § 501, at 322. Monopoly power, often used synonymously with market power, has been described as the power to "raise prices or to exclude competition." *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946).

197. 2 P. AREEDA & D. TURNER, *supra* note 4, §§ 503, 505.

198. See L. SULLIVAN, *supra* note 1, § 9, at 33-34, § 22, at 75-76. See also Stein & Brett, *supra* note 191, at 672 n.178 (cataloging numerous cases).

199. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); L. SULLIVAN, *supra* note 1, § 6, at 23, § 9, at 33.

200. 2 P. AREEDA & D. TURNER, *supra* note 4, §§ 508, 512.

201. *Id.* §§ 509, 513.

202. *Id.* § 514.

203. Indeed, conduct-oriented alternatives may not save the court from structural analysis because, as Professors Areeda and Turner have observed, the alternatives inevitably require careful market definition and structural analysis to establish that the market power of a firm is individually held, rather than shared. *Id.* §§ 512-515. See also Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 244 (1979) (arguing that evaluation of predatory practices requires structural analysis).



power."<sup>204</sup> Simplified structural analysis, by contrast, although somewhat crude and inexact, is at least susceptible of proof in a judicial framework.<sup>205</sup>

Of course, there may be rare cases in which the structural evidence is attenuated and proffered conduct evidence is particularly strong. In such instances, assuming that future developments in economic theory and accounting practice make proof of market power through conduct more ascertainable and reliable, courts should not hesitate to use conduct analysis conjunctively with structural analysis.<sup>206</sup> For the present, however, structural analysis is the primary, and usually exclusive, determinant of a firm's market power.

It is clear, then, that under present law market structure issues play an important role in antitrust litigation. Moreover, in practice and in logic they may be viewed separately from firm conduct and injury and damage issues. The relevance of these observations to the scope of the right to jury trial of antitrust issues will shortly become apparent, when English legal history is examined.<sup>207</sup>

## 2. Firm Conduct Issues

Once the stage has been set by structural analysis, the second broad set of antitrust issues concerns the characterization and evaluation of the defendant firm's conduct in the marketplace.<sup>208</sup> Here the concern is with what the defendant did, whether there was an anticompetitive effect upon competitors, consumers, or other marketplace participants, and what the nature of defendant's intent or purpose was: To create efficiencies, perfect the market, honestly respond to competition, save a failing company, or impede or eliminate competition. The trier of fact must determine whether the conduct unreasonably restrains trade or tends substantially to lessen competition or create a monopoly. Certainly not all of these questions must be answered to establish each

204. 2 P. AREEDA & D. TURNER, *supra* note 4, § 515, at 345.

205. See Joskow & Klevorick, *supra* note 203, at 260-62.

206. L. SULLIVAN, *supra* note 1, § 25, at 81.

207. See text accompanying notes 361-62 *infra*.

208. Professor Sullivan describes the original preeminence and continuing significance of conduct issues in antitrust:

Until theoretical economics began to make contributions to antitrust, conduct analysis was the only analysis known to antitrust. Though courts did not use this label for their activity, they did determine whether a firm violated the antitrust laws by looking at what the firm had done and, in an effort to gain a fuller understanding of the conduct and its likely consequences, at the reasons behind the firm's actions. Though alternative modes of analysis are now also relied upon, conduct analysis remains a major element in antitrust law. Some things a firm may do in an effort to achieve its market objectives are lawful, while others are not; some conduct is deemed consistent with competition, other conduct is not. Motive or purpose, moreover, remains a guide in characterizing conduct.

L. SULLIVAN, *supra* note 1, § 6, at 23 (footnotes omitted).

statutory antitrust offense, but they are representative of the type of conduct issues frequently encountered.

### 3. *Injury and Damage Issues*

The third broad set of issues in private treble damage antitrust litigation concerns the plaintiff's injury and damages. Establishing the defendant's wrongdoing through structure and conduct evidence does not alone suffice to merit an award of treble damages. The plaintiff has the additional burden of establishing that injury in fact occurred and that damages were actually suffered.<sup>209</sup> The injury-in-fact issue requires proof that plaintiff suffered an economic injury "in his business or property"<sup>210</sup> that was causally linked to the anticompetitive conduct of the defendant.<sup>211</sup> Once the causal link is established, the plaintiff must prove the nature and extent of the monetary damages needed to compensate for the injury. While rigorous proof is not required,<sup>212</sup> individ-

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209. See generally 2 P. AREEDA & D. TURNER, *supra* note 4, §§ 331-349; L. SULLIVAN, *supra* note 1, §§ 247, 251.

210. Clayton Act § 4, 15 U.S.C. § 15 (1976).

211. Professor Sullivan amplifies the burden of proving causation in private antitrust actions: Proof that injury occurred—proof of the fact of damage, as the process is sometimes called—is usually straightforward. There has been no tendency to lighten plaintiff's burden; the preponderance of evidence rule applies in unqualified form. Proof of an overcharge, an exclusion from a market, a termination or loss of suppliers or customers are illustrative of the kinds of things to serve to meet the burden.

L. SULLIVAN, *supra* note 1, § 251, at 785.

Mere loss of profits during the period of defendant's antitrust violation, for example, is not grounds for recovery unless the plaintiff can also establish that the profits were lost precisely because of the defendant's activities. Professors Areeda and Turner argue, however, that the plaintiff's burden in proving the amount of resulting damages should be relatively light:

Money awards under the antitrust laws do not serve only to compensate injured plaintiffs. Treble damages also punish wrongdoers and enlist private plaintiffs in the work of detecting, punishing, and thereby deterring wrongdoing. And if this public function of private damage actions is not to be frustrated, courts must not insist upon unduly rigorous proof of the quantum of plaintiff's injury, for the marketplace usually denies us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation.

2 P. AREEDA & D. TURNER, *supra* note 4, ¶ 343, at 227-28 (footnotes omitted).

Closely related to the *fact* of causation are issues of "standing" that concern *legal* causation. These threshold issues of standing are court-developed rules designed "to confine the availability of § 4 relief only to those individuals whose protection is the fundamental purpose of the antitrust laws." *In re Multi-District Vehicle Air Pollution Litigation*, 481 F.2d 122, 125 (9th Cir.) *cert. denied*, 414 U.S. 1045 (1973). They stem from judicial recognition that, absent such rules, § 4 liability might extend to endless persons in the chain of causation. For an excellent discussion of this complex area of law, see Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977). Issues of standing, however, are not of concern here, because, like other jurisdictional issues, they are tried by a judge and resolved at the outset of litigation. See, e.g., *In re Multi-District Vehicle Air Pollution Litigation*, 481 F.2d at 125; *Calderone Enter. Corp. v. United Artists Theatre Circuit*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

212. As the Supreme Court has observed, "The most elementary conceptions of justice and

ual cases may still present difficult and complicated damage issues.<sup>213</sup> It is even possible that in some instances a plaintiff may not be able to establish compensable damages.<sup>214</sup> Injury and damages issues are generally quite separate from liability questions which involve structure and conduct. Indeed, on occasion courts have accorded separate trials on injury and damages issues.<sup>215</sup> These issues, however, are not completely unrelated to structure and conduct, because the scope of plaintiff's damage claim is necessarily limited by the scope of the market affected by the defendant's conduct.

### *B. The Role of Structure, Conduct, and Damages Issues in Substantive Antitrust Law*

Injury and damages issues play a significant and distinct role in every private antitrust suit for damages.<sup>216</sup> The relative importance of structure and conduct issues in a particular case, however, may vary considerably, depending upon the statutory offense involved. This section will examine the relationship between structure and conduct in a variety of contexts, and will demonstrate how the two issues diverge in antitrust litigation.<sup>217</sup>

#### *I. Monopolization*

Probably the clearest and most well-defined relationship between structure and conduct is in monopolization cases under section 2 of the Sherman Act.<sup>218</sup> Beginning with Judge Learned Hand's opinion in *United States v. Aluminum Co. of America*,<sup>219</sup> in which a market structure analysis was employed to define the relevant market and then measure power by reference to industry concentration levels and firm

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public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946).

213. See 2 P. AREEDA & D. TURNER, *supra* note 4, ¶ 344a-f.

214. See, e.g., *id.* ¶ 345; note 216 *infra*.

215. See, e.g., *Response of Caroline, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976); *Lo Cicero v. Humble Oil & Ref. Co.*, 52 F.R.D. 28 (E.D. La. 1971). See also 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2389 n.32.

216. In many cases, this set of issues may be quite difficult for a private plaintiff to prove. Such difficulties are probably most acute in litigation challenging mergers under § 7 of the Clayton Act. See, e.g., *Brunswick Corp. v. Pueblo Bowl-o-Mat*, 429 U.S. 477 (1977); ABA ANTITRUST SECTION, MONOGRAPH NO. 1, MERGERS AND THE PRIVATE ANTITRUST SUIT: THE PRIVATE ENFORCEMENT OF SECTION VII OF THE CLAYTON ACT POLICY AND LAW 7-13 (1977). As a consequence, there are relatively few private merger actions seeking damages.

217. While no attempt is made here to completely catalogue all antitrust offenses, those considered comprise the bulk of private antitrust litigation and offer an instructive view of the general manner in which courts have treated structure and conduct issues.

218. 15 U.S.C. § 2 (1976).

219. 148 F.2d 416 (2d Cir. 1945).

market share,<sup>220</sup> courts have consistently followed a structural approach in monopoly cases.<sup>221</sup> Definition and proof of the relevant market is "a necessary predicate" for evaluating monopoly claims,<sup>222</sup> since the existence of monopoly power "ordinarily may be inferred from the predominant share of the market."<sup>223</sup> Plaintiff's failure to carry its burden of proof in establishing defendant's monopoly power in a relevant market is ground for dismissal.<sup>224</sup> Structural proof of monopoly power, however, is not presently a sufficient basis for liability under section 2,<sup>225</sup> notwithstanding the undesirable effects of higher prices, restricted output, and a redistribution of income from consumers to producers that flow from the possession of such power.<sup>226</sup> Conduct issues remain a crucial part of a private monopolization suit. To establish liability, a plaintiff must demonstrate that the conduct of the defendant has been predatory or otherwise anticompetitive.<sup>227</sup> The separate nature of the structure and conduct issues involved in a monopolization case has been evidenced by a recent survey of judges and practitioners. They had little difficulty estimating the separate amounts of trial time needed to litigate structure and conduct issues: approximately twenty-five to fifty-five percent for structure issues and thirty to sixty percent for con-

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220. L. SULLIVAN, *supra* note 1, § 11.

221. *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207 (9th Cir. 1977); *Telex Corp. v. IBM Corp.*, 510 F.2d 894 (10th Cir. 1975); *ILC Peripherals v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

222. *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1301 (9th Cir. 1978).

223. *United States v. Grinnell Corp.*, 384 U.S. at 571.

224. *See, e.g.*, *Fount-Wip, Inc. v. Reddi-Wip*, 568 F.2d 1296, 1301 (9th Cir. 1978); *ILC Peripherals v. IBM Corp.*, 458 F. Supp. at 430.

225. *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. at 570-71; L. SULLIVAN, *supra* note 1, § 7. One of the topics considered for review by the President's National Commission for the Review of Antitrust Laws and Procedures was the need to alter the present substantive monopolization standards of § 2 of the Sherman Act. In a statement prepared for the Antitrust Commission, Professor Flynn proposed a substantive change that would permit the government to challenge persistent and substantial monopoly power whenever it was found to exist, without the necessity of proving bad conduct on the part of the monopolist. *See* Statement of John J. Flynn, July 12, 1978, *reprinted in* 48 ANTITRUST L.J. 845 (1980). The proposal received a good deal of support, *see, e.g.*, Dougherty, *supra* note 191, resulting in a recommendation by the Antitrust Commission that Congress give serious consideration to strengthening the Sherman Act along the lines suggested by Professor Flynn. *Report of the Special Advisory Panel on Ethical Issues in Complex Antitrust Litigation*, 2 REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 97, 141-74 (1979). For a proposal greatly reducing proof of conduct in a government-initiated suit seeking injunctive relief against monopolization, *see* 3 P. AREEDA & D. TURNER, *supra* note 4, ¶ 625-26.

226. *See, e.g.*, F. SCHERER, *supra* note 1, at 20; Dougherty, *supra* note 191, at 871; *Separate Views of Commissioner Fox*, 2 REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 339-47 (1979).

227. *See, e.g.*, *U.S. v. Grinnell Corp.*, 384 U.S. at 570-71; 3 P. AREEDA & D. TURNER, *supra* note 4, ¶ 613; L. SULLIVAN, *supra* note 1, § 7.

duct issues; the remainder of trial time is spent on proof of damages.<sup>228</sup> Similar time estimates for these separate issues have been made for pretrial pleading and discovery.<sup>229</sup>

In most other areas of antitrust law, the relationship between structure and conduct is probably not as well defined as in monopoly cases. Nevertheless, a separation of the two sets of issues can usually be demonstrated. Merger law, for example, appears to be at one end of the spectrum, where structural analysis dominates. At the other end, per se violations of section 1 of the Sherman Act involve no structural analysis and turn instead upon conduct. The remaining antitrust offenses occupy places between these extremes in their emphasis on either structure or conduct.

## 2. Mergers

When mergers are evaluated under section 7 of the Clayton Act,<sup>230</sup> analysis of market structure issues is critical.<sup>231</sup> In *Brown Shoe Co. v. United States*<sup>232</sup> the Supreme Court explained the significance of structural issues in these cases:

[D]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition "within the area of effective competition." Substantiality can be determined only in terms of the market affected. The "area of effective competition" must be determined by reference to a product market (the "line of commerce") and a geographic market (the "section of the country").<sup>233</sup>

Moreover, the Court recognized the important stage-setting role played by market structure analysis: "[E]xamination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger."<sup>234</sup> The significance of market structure issues in the evaluation of mergers has been emphasized by the Justice Department's

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228. See Gerhart, *Report on the Empirical Case Studies Project*, 2 REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 19-27, 95-96 (1979), discussed in Dougherty, *supra* note 191, at 872-73.

229. See Dougherty, *supra* note 191, at 872-73.

230. 15 U.S.C. § 18 (1976).

231. There is an ongoing debate over whether structural analysis for mergers ought to employ the same market definition standards used in monopoly analysis, an approach apparently sanctioned by the Supreme Court. Compare *United States v. Grinnell Corp.*, 384 U.S. at 571, with *Stein & Brett*, *supra* note 191, at 643-48. See also Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281, 315 (1956). It is sufficient to note here that proponents of these differing views concur at least in the importance of structural analysis for merger evaluation.

232. 370 U.S. 294 (1962).

233. *Id.* at 324, quoting *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1956).

234. *Id.* at 322 n.38.

Merger Guidelines,<sup>235</sup> and notably reaffirmed in *United States v. General Dynamics Corp.*<sup>236</sup> and *United States v. Marine Bancorporation, Inc.*<sup>237</sup> Horizontal mergers, for example, are evaluated on the basis of the resulting firm's market share and the concentration levels in the industry.<sup>238</sup> Other structural issues such as market trends and entry barriers may also play a role.<sup>239</sup> This structural evidence alone is sufficient to establish a prima facie case that a merger may substantially lessen competition or tend to create a monopoly, in violation of section 7 of the Clayton Act.<sup>240</sup> A defendant may rebut a prima facie case, but the necessary evidence to do so is also structural.<sup>241</sup> Conduct issues in such cases are either nonexistent or play a very limited role.<sup>242</sup> They may be relevant in a case in which the defendant seeks to defend the merger as necessary to save a failing company,<sup>243</sup> or perhaps in the rare case when there is a dispute over whether an acquisition, as defined by the statute, actually took place.<sup>244</sup> But even in these instances of limited use, the conduct issues tend to be quite distinct from the structural issues.

### 3. *Per Se Offenses*

At the other end of the spectrum are the per se offenses which, under section 1 of the Sherman Act,<sup>245</sup> do not require proof of market structure issues. Proof of the prohibited conduct is sufficient to establish liability.<sup>246</sup> The offenses that have been deemed "per se" unreasonable restraints of trade, *i.e.*, horizontal price fixing and market

235. Justice Department Merger Guidelines (1968), reprinted in TRADE REG. REP. (CCH) ¶ 4510.

236. 415 U.S. 486 (1974).

237. 418 U.S. 602 (1974).

238. See, e.g., *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963). See also note 194 *supra*.

239. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

240. See, e.g., *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

241. See, e.g., *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

242. Conduct evidence in merger analysis has been regarded as intrinsically unreliable if it involves postacquisition conduct, *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965), or subjective, self-serving evidence of intent, *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 563-70 (1973) (Marshall, J., concurring).

243. See, e.g., *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969).

244. Market structure issues also dominate vertical merger and conglomerate merger litigation. The critical variable in vertical merger analysis is market foreclosure, which must be measured in the upstream and downstream markets. See L. SULLIVAN, *supra* note 1, §§ 210-212. Conglomerate merger analysis may focus upon potential competition, reciprocity, or entrenchment, but in each of these theories market structure issues are paramount. See *id.* §§ 205-209.

245. 15 U.S.C. § 1 (1976).

246. See text accompanying note 208 *supra* for a discussion of conduct issues.

division<sup>247</sup> and vertical price fixing,<sup>248</sup> are considered so pernicious or so lacking in redeeming economic value that they are prohibited outright whenever they are proved,<sup>249</sup> without inquiry into market structure.

#### 4. Rule of Reason Offenses

Conduct not deemed to be per se unreasonable under section 1 of the Sherman Act is evaluated under the "rule of reason" to determine whether the particular restraint in question is unreasonable.<sup>250</sup> This analysis is often complicated because it involves both structure and conduct issues. The interplay between these issues is not well defined. The Supreme Court has contributed to this lack of clarity concerning the respective roles of structure and conduct in restraint of trade cases by its failure to provide guidance for rule of reason analysis. The Court has only listed a number of factors that should be considered in determining whether conduct is unreasonable.<sup>251</sup> Nevertheless, as rule

247. See, e.g., *United States v. Topco Assoc. Inc.*, 405 U.S. 596 (1972); *United States v. Soccony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 223 (1940).

248. See, e.g., *Albrecht v. The Herald Co.*, 390 U.S. 145 (1968).

Group boycotts are also sometimes said to be per se illegal. This is true with respect to classic group boycotts, which Professor Sullivan defines as "concerted efforts by traders at one level to keep others out or inhibit their competitive efforts at that level by making it more difficult for them to find what traders at that level need, usually suppliers or customers but sometimes access to transactions with other traders at the same level." L. SULLIVAN, *supra* note 1, § 83, at 232. Other concerted group activities, however, which are intended by the participants to achieve beneficial results, such as industrywide self-policing, are accorded fuller analysis by courts. See generally L. SULLIVAN, *supra* note 1, §§ 83-92.

249. See, e.g., *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

250. See, e.g., *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

The Supreme Court recently articulated the two types of analysis in *National Soc'y of Professional Eng'rs v. United States*:

There are . . . two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal *per se*"—in the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.

435 U.S. 679, 692; accord, *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 7-8 (1979).

251. See, e.g., *Continental TV Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 n.15 (1977); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 329 (1961); Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 33-34 (1978); Zelek, Stern & Dunfee, *A Rule of Reason Decision Model After Sylvania*, 68 CALIF. L. REV. 13, 14 n.12 (1980). The most oft-quoted list continues to be the factors enumerated in Justice Brandeis's 1918 opinion in *Chicago Board of Trade*:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or proba-

of reason analysis develops, distinct and manageable roles are likely to emerge for structure and conduct issues.

Analyzing the judicial treatment of nonprice vertical restraints may suggest the proper roles of structure and conduct issues in restraint of trade cases. In *Continental TV, Inc. v. GTE-Sylvania, Inc.*,<sup>252</sup> the Supreme Court overturned its previous per se rule approach to non-price vertical restraints and required instead full rule of reason analysis to determine whether the alleged harms from a reduction in intrabrand competition, brought about by a vertical restraint imposed by the manufacturer, were outweighed by efficiencies and the potential benefits of increased intrabrand competition. Although the Court did not explain the sequence of steps it expected a trial court to follow when conducting the required analysis, commentators assessing *Sylvania* have recognized separate roles that market structure and firm conduct issues must play.<sup>253</sup> The first question a court should probably seek to answer is whether more than a de minimis amount of interbrand competition is affected by the vertical restriction.<sup>254</sup> This question turns upon market structure analysis and may well be dispositive of the litigation if only a very small share of the market is affected.<sup>255</sup> The importance of such early structural analysis as a means of screening out unmeritorious cases appears to be growing,<sup>256</sup> as demonstrated by the Ninth Circuit's recently articulated view that, "[u]nless the alleged anticompetitive conduct is *per se* unreasonable, the fact that the conduct restrained trade in a relevant market is an essential part of a plaintiff's case.' . .

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ble. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the Court to interpret facts and to predict consequences.

Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). Such lists led Professor Posner to comment: "The content of the Rule of Reason is largely unknown; in practice, it is little more than a euphemism for non-liability." Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 14 (1977).

252. 433 U.S. 36 (1977).

253. See, e.g., Pitofsky, *supra* note 251, at 33-37; Posner, *supra* note 251, at 17-19; Zelek, Stern & Dunfee, *supra* note 251, at 23-46. See also Bohling, *A Simplified Rule of Reason for Vertical Restraints: Integrating Social Goals, Economic Analysis, and Sylvania*, 64 IOWA L. REV. 461 (1979).

254. See text accompanying notes 258-59 *infra*. In certain cases, there may be an initial question concerning whether an agreement was formed within the meaning of § 1 of the Sherman Act, which tends to be a question of conduct.

255. See, e.g., *DeVoto v. Pacific Fidelity Life Ins. Co.*, 618 F.2d 1340 (9th Cir. 1980); *Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); *Determined Prods., Inc. v. R. Dakin & Co.*, 1980-1 TRADE CAS. ¶ 63,063 (N.D. Ca. 1979).

256. See, e.g., *Gough v. Rossmoor Corp.*, 585 F.2d 381, 389-90 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); *Dougherty v. Continental Oil Co.*, 579 F.2d 954, 962 (5th Cir. 1978); *Columbia Metal Culvert Co. v. Kaiser Aluminum and Chem. Corp.*, 579 F.2d 20, 26-27 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978).



[C]ompetitive injuries must be defined in terms of a discrete market."<sup>257</sup>

In cases where more than a de minimis market impact is demonstrated, rule of reason analysis should progress to a balancing of anticompetitive harms and procompetitive benefits or justifications. In assessing nonprice vertical restraints, this requires measuring the losses in intrabrand competition against the resulting gains in interbrand competition. At this point, both conduct and structure issues are important. The defendant's conduct must be assessed in terms of the negative impact upon intrabrand competition, the purposes and justifications behind the vertical restraint, the availability of less restraining alternatives, and the likely procompetitive advantages to result in the interbrand market.<sup>258</sup> These conduct factors, however, cannot be reasonably assessed without knowledge of the structure of the market and the defendant's market power.<sup>259</sup> For example, restrictions reasonable for a firm with a ten percent market share may be quite unreasonable for a firm with monopoly power or for a member of a tight oligopoly. When firms possess a significant share indicating market power, intrabrand competition is much more important to insure competitive prices.<sup>260</sup> Thus, in order to assess the reasonableness of a particular vertical restraint, the trier of fact would have to consider both the defendant's conduct and the structure of the market.

### 5. *Attempted Monopolization*

Like the offense of monopolization, an attempt under section 2 of the Sherman Act involves both structure and conduct issues, but their respective roles are different and less clearly defined. Attempts place

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257. *E.g.*, *DeVoto v. Pacific Fidelity Life Ins. Co.*, 618 F.2d 1340, 1344-45 (9th Cir. 1980) (quoting *Gough v. Rossmoor Corp.*, 585 F.2d at 385).

258. *See Pitofsky*, *supra* note 251, at 34-37; Zelek, Stern & Dunfee, *supra* note 251, at 28, 26-46.

259. A two-stage approach to rule of reason cases has also been promoted by some commentators, who advocate the use of structural analysis to assess the likelihood that the conduct in question will have sufficient market impact to be actionable. Only where the trier of fact found that the initial market structure prerequisites were met would it proceed to traditional rule of reason analysis. *See, e.g.*, Joskow & Klevorick, *supra* note 203, at 242-59 and text accompanying notes 266-67 *infra*; Posner, *supra* note 251, at 19; Note, *An Economic and Legal Analysis of Physical Tie-Ins*, 89 YALE L.J. 769, 790-95 (1980).

The appeal of these developments in § 1 cases is obvious: courts and defendants may be rid of the burden of meritless actions early, without mounting a trial of issues of conduct, motive, and intent. But this section of the Sherman Act is directed against anticompetitive conduct, and courts should be careful not to preclude hearings of possibly valid claims. It may be that some cases involve conduct so egregiously anticompetitive that a court sensitive to values beyond economic efficiency ought to consider lowering or eliminating the plaintiff's burdens with respect to the proof of market structure issues. *See, e.g.*, *Klors, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959).

260. *See, e.g.*, *Pitofsky*, *supra* note 251, at 35; Zelek, Stern & Dunfee, *supra* note 251, at 31-36.

greater emphasis on conduct issues of intent and predation than on market structure questions.<sup>261</sup> Nevertheless, in most courts structure issues must still be addressed in an attempt case.<sup>262</sup> The Supreme Court has observed that there is a need for structure evidence in attempt cases as well as in actions charging monopolization:

To establish monopolization or attempt to monopolize a part of trade or commerce under § 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal [conduct] in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure [the defendant's] ability to lessen or destroy competition.<sup>263</sup>

In the Ninth Circuit, however, specific proof of relevant markets and firm share apparently is less critical in attempt cases.<sup>264</sup> Yet even in this circuit, market structure evidence can be relevant, as the court recognized recently in *Blair Foods, Inc. v. Ranchers Cotton Oil*:<sup>265</sup> "While not indispensable, evidence of market power is relevant in this context [of attempted monopoly] and may suggest the existence of specific intent to monopolize."

Structural analysis may also be necessary to assess properly the defendant's alleged predatory conduct, which cannot be weighed in a vacuum. Pressing such a position, Professors Joskow and Klevorick have proposed that predatory pricing, a practice commonly alleged in actions concerned with an attempt to monopolize, should be analyzed in two stages.<sup>266</sup> First-stage analysis would examine the structural characteristics of the market and the market power of the alleged predator firm to determine whether there existed a reasonable expectation that predatory pricing was likely to occur in the particular market in question. Only if these threshold requirements were met would a court proceed to the second stage to make a detailed examination of the

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261. See, e.g., Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 373, 424-34 (1974); Stein & Brett, *supra* note 191, at 648-52; Turner, *supra* note 231, at 307; Note, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case*, 73 COLUM. L. REV. 1451, 1452-54 (1973).

262. See, e.g., Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347, 1368 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); United States v. Empire Gas Corp., 537 F.2d 296, 302 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); George R. Whitten, Jr., Inc. v. Baddock Pool Bldrs., Inc., 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

263. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965).

264. See, e.g., Greyhound Computer Corp. v. IBM Corp., 559 F.2d 488, 504 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); Knutson v. Daily Review, Inc., 548 F.2d 795, 813-14 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

265. 1980-1 TRADE CAS. ¶ 63,104, at 77,519 (9th Cir. 1980).

266. Joskow & Klevorick, *supra* note 203.

defendant's intent and behavior.<sup>267</sup>

#### 6. *Exclusive Dealing, Requirements Contracts, and Tie-ins*

Perhaps the least developed doctrinal relationship between structure and conduct has been in exclusive dealing, requirements contracts, and tie-in cases under section 3 of the Clayton Act.<sup>268</sup> Since *Tampa Electric Co. v. Nashville Coal Co.*,<sup>269</sup> it has been clear that analysis of exclusive dealing arrangements and requirements contracts under section 3 requires consideration of the following structural factors:

*First*, the line of commerce, *i.e.*, the type of goods, wares, or merchandise, etc., involved must be determined, where it is in controversy, on the basis of the facts peculiar to the case. *Second*, the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies. In short, the threatened foreclosure of competition must be in relation to the market affected. . . . *Third*, and last, the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market.<sup>270</sup>

Careful market structure analysis also appears required now with respect to tie-ins, to determine whether the defendant has sufficient economic power in the tying product to appreciably restrain competition in the tied product. Although monopoly power, or even market dominance, is not required to establish a tie-in violation, the Supreme Court has held that a court must still consider "whether the seller has the power within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market."<sup>271</sup> Once the requisite market power is determined and a not insubstantial amount of interstate commerce is found to be affected, then tie-ins are treated harshly, in a *per se* fashion.<sup>272</sup> The initial inquiry, however, remains committed to market structure analysis. The conduct issues in these cases appear

267. *Id.* at 242-44. Professors Joskow and Klevorick recognize that the two-stage structure/conduct approach would also be appropriate for the evaluation of other anticompetitive conduct subject to rule-of-reason analysis. *Id.* at 217, 270.

268. 15 U.S.C. § 14 (1976).

269. 365 U.S. 320 (1961).

270. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-28 (1961). It should be noted that the Court's structural analysis of § 3 exclusive dealing arrangements and requirements contracts closely parallels the structural analysis applied to vertical mergers. See L. SULLIVAN, *supra* note 1, § 211. However, since the contractual arrangements addressed by § 3 are not as binding and as lasting as vertical integration through mergers, it would seem appropriate that the market power and market foreclosure levels giving rise to liability should be higher in § 3 cases than in § 7 merger cases. See L. SULLIVAN, *supra* note 1, § 165, at 484.

271. *United States Steel Corp. v. Fortner Enterprises, Inc.* [II], 429 U.S. 610, 620 (1977).

272. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 11 (1958).

quite limited and when present tend to involve an assessment of whether the alleged restrictive agreements in fact exist and what purpose or justification lies behind the agreements.<sup>273</sup>

### 7. Joint Ventures

One of the growing areas of antitrust concern is joint venture arrangements. Analyzed under section 7 of the Clayton Act or section 1 of the Sherman Act, joint ventures also require consideration of structure and conduct issues.<sup>274</sup> As in merger analysis, market structure must be developed in order to assess the potential anticompetitive effects of the joint venture. However, because a joint venture adds a new competitor to a market,<sup>275</sup> the levels of industry concentration and firm market shares that might trigger antitrust concern are generally higher than those set for mergers.<sup>276</sup> Moreover, greater weight is likely to be given to conduct issues of intent and justifications.<sup>277</sup> As in some other substantive areas of antitrust, however, the precise relationship between structure and conduct must await further development by the courts, but the separate treatment accorded structure and conduct issues is nonetheless clear.

### C. Historical Treatment of Antitrust Issues

Modern antitrust litigation, then, comprises certain recurring issues of structure, conduct, and damages, some of them devilishly complex. But their complexity alone, as we have seen, will not justify their resolution by judges rather than by juries. Rather, the Seventh Amendment requires a search of English legal history to determine how issues of structure, conduct, and damages were treated in 1791. That historical inquiry reveals that, while English juries quite regularly heard and decided conduct and damage issues in civil litigation, they did not actually try market structure issues or issues that might be thought roughly

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273. See, e.g., *Advance Business Sys. & Supp. Co. v. SCM Corp.*, 415 F.2d 55 (4th Cir. 1969), cert. denied, 397 U.S. 920 (1970) (course of conduct used to demonstrate existence of tying agreement); *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 270 F. Supp. 619 (S.D.N.Y.), rev'd on other grounds, 388 F.2d 272 (2d Cir. 1967) (legitimate business purposes might remove tying arrangement from antitrust liability). Justifications are received more favorably in § 3 cases than in § 7 cases because § 3 addresses conduct of a less permanent nature than merger.

274. See, e.g., Brodley, *Legal Status of Joint Ventures Under the Antitrust Laws: A Summary Assessment*, 21 ANTITRUST BULL. 453 (1976); Joelson & Griffin, *Multinational Joint Ventures and the U.S. Antitrust Laws*, 15 VA. J. INT'L L. 487 (1975); Pitofsky, *Joint-Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 HARV. L. REV. 1007 (1969).

275. *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964).

276. See, e.g., Brodley, *supra* note 274, at 472-78; Pitofsky, *supra* note 274, at 1019 n.33, 1041-42.

277. See, e.g., Brodley, *supra* note 274, at 474, 478-81; Pitofsky, *supra* note 274, at 1019-20, 1053.

analogous to market structure issues.<sup>278</sup>

Professor Thayer reports, for example, that it was typical for a jury to decide questions such as "Was a party in possession of something? Did he disseise somebody? Had he put his seal to a paper? Did he enfeof another of land? and what land?"<sup>279</sup> To be sure, these examples are not the same conduct questions that might be relevant in an antitrust case. But they do reveal that juries decided questions of conduct that involved assessments of a party's actions, motives and intentions—assessments roughly analogous to those that must be made when deciding conduct issues in modern antitrust litigation.<sup>280</sup> Damages, too, were plainly jury questions. As early as 1302, following a jury verdict in favor of the plaintiff, Professor Thayer notes this exchange between judge and jury: "Brumpton, J., says: 'Tell us the damages.' The assise: 'Ten Shillings.'"<sup>281</sup>

Market structure issues, in contrast, lack historical counterparts. Relevant market definition, industry concentration levels, firm market share, and firm market power issues, as understood in modern antitrust litigation, were completely foreign to English courts in 1791. This is probably not surprising, since these are issues relevant to analyzing the competitiveness of private trade in free markets. Adam Smith, after all, had not written *The Wealth of Nations* until 1776. And only by the turn of the eighteenth century had laissez faire economics and the concept of competitive markets begun to take hold in England.<sup>282</sup> The prior two hundred years had witnessed an English economy built upon a mercantilist tradition that favored government-created monopolies, government intervention, and regulation of markets, not competition among private producers.<sup>283</sup> Indeed, market structure issues are of re-

278. "[T]here are not to be found in English law cases on restraint of trade comparable with the American cases." Devlin, *supra* note 12, at 85. See also Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 373, 385 (1954).

279. Thayer, "Law and Fact" in *Jury Trials*, 4 HARV. L. REV. 147, 148 (1890); see Weimer, *supra* note 32, at 1871. Early cases treating conduct questions as matters for jury decision include, e.g., *Kruger v. Wilcox*, Ambler 252, 27 Eng. Rep. 168 (1755) (jury employed its own knowledge of merchants' customs); *Eaton v. Southby*, Willes 131, 125 Eng. Rep. 1094 (1738) (the judge's role is to state the legal standard of conduct; the jury must determine, as a question of fact, whether the party's conduct conforms to the legal standard); *Slade's Case*, 4 Co. Rep. 92a, 76 Eng. Rep. 1072, 1074 (1603) (jury found the nature of the bargain formed by the parties).

280. See notes 208, 251 *supra*.

281. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 295, 316 (1892).

The jury's power to set damages enjoyed an early development in defamation as well as in contract cases. See, e.g., *Gilbert v. Berkinshaw*, Loft 771, 98 Eng. Rep. 911 (1776); *Russell v. Palmer*, 2 Wils. 325, 95 Eng. Rep. 837 (1767); *Townsend v. Hughes*, 2 Mod. 150, 86 Eng. Rep. 994 (c. 1680) ("by the law the jury are judges of the damages"). See also SEDGWICK ON DAMAGES § 605 (1913); Farley, *Instructions to Juries—Their Role in the Judicial Process*, 42 YALE L.J. 194 (1932).

282. See, e.g., Letwin, *supra* note 278, at 371-73.

283. See, e.g., *id.*; 4 W. HOLDSWORTH, *supra* note 27, at 350:

cent vintage even in American antitrust litigation. As Professor Sullivan observes, *United States v. Aluminum Co. of America*,<sup>284</sup> decided in 1945, marks the beginning of modern antitrust analysis in which "courts exploring issues of single firm power have drawn insight from economic theory and . . . [have utilized] a simplified structural analysis."<sup>285</sup>

Given the vast differences between the economic systems of eighteenth century England and twentieth century America, and the comparatively recent emergence of market structure issues in modern antitrust litigation, it may be tempting to abandon or at least greatly foreshorten the search for English precedent. As previously noted, however, the historical test mandates a careful search to determine if reasonably close analogues to market structure issues existed in England in 1791, and if so, whether they were tried to a judge or jury.

What constitutes an analogue for Seventh Amendment purposes is obviously important. Courts addressing the problem, however, have not set forth parameters for decision. Rather, they have made only rough judgments on a case-by-case basis concerning the similarity of historical statutes or causes of action that are advanced as counterparts of modern litigation.<sup>286</sup> Rough judgments are perhaps all that can be reasonably expected of historical inquiry. It would seem logical, however, to conduct a search for issue analogues by first locating those English statutes and common law causes of action existing in 1791 that share an identity of purpose, parties, procedures, and relief with the modern litigation in question. If such statutes or causes of action are found, then litigation involving them should next be scrutinized to determine whether each of the issues present in the modern litigation has an analogue, and if so, whether the analogue was tried to a judge or a jury.

Conducting such an inquiry for structure issues in modern anti-

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[F]reedom of trade did not mean to Coke and his fellows what it means to an economist or a politician of today. The freedom they meant was freedom from arbitrary restraints not recognized by the law; but this was quite consistent with considerable restrictions of that freedom whenever it was desirable in the interests of the State that it should be restricted.

See also H. FOX, *MONOPOLIES & PATENTS* (1947).

284. 148 F.2d 416 (2d Cir. 1945).

285. L. SULLIVAN, *supra* note 1, § 9, at 33, § 11.

286. See, e.g., *Pernell v. Southall Realty*, 416 U.S. 363 (1974); *Curtis v. Loether*, 415 U.S. 189, 195 n.10 (1973); *Insurance Co. v. Comstock*, 83 U.S. (16 Wall.) 258, 268-69 (1872); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446-47 (1830); *Damsky v. Zavatt*, 289 F.2d 46 (2d Cir. 1961). "[T]he test," as the court put it in *Martin v. Detroit Marine Terminals, Inc.*, 189 F. Supp. 579, 582 (E.D. Mich. 1960), "is *not* whether such action is more or less broadly analogous to an established common-law action, but rather whether such issue must, by analogy or because of historical considerations, be characterized as a 'legal' issue." (Emphasis in original.) *Accord*, *Ochoa v. American Oil Co.*, 338 F. Supp. 914, 918 (S.D. Tex. 1972).

trust litigation reveals that the English laws concerning restraint of trade, monopoly, forestalling, regrating, and engrossing provide the only potentially close analogues. Others have sometimes even referred to these laws as the forebears of modern antitrust law.<sup>287</sup> Close scrutiny, however, reveals that although the nomenclature used in English cases and statutes is often the same as that employed in modern antitrust statutes and opinions, the concepts themselves are remarkably different. However, even if these English laws are taken to be crude analogues to modern antitrust legislation, historical research reveals that market structure issues under those laws were either nonexistent or, to the extent that they may possibly be inferred, were tried by judges at common law rather than by juries.

### 1. *Restraint of Trade*

The English restraint of trade laws applied to private contractual arrangements where one party agreed not to compete with the other within a particular geographic area, for particular customers, or for a set period of time. For example, an apprentice to a linen draper agreed not to set up a competing shop within a half mile of her mistress' shop once her articles of apprenticeship were ended;<sup>288</sup> a surgeon's apprentice agreed not to compete within ten miles of his master's town for a period of fourteen years;<sup>289</sup> an attorney sold his practice and agreed not to practice as an attorney within 150 miles of London;<sup>290</sup> and a partner sold his interest in a ropemaking business, agreeing not to sell rope in the future to specified customers.<sup>291</sup>

By 1711 the law was well established, as the court noted in *Mitchel v. Reynolds*,<sup>292</sup> that general restraints "not to exercise a trade throughout the kingdom" were void.<sup>293</sup> Particularized restraints, however, might be upheld if "made upon good and adequate consideration, so as to make it a proper and useful contract" to the parties involved.<sup>294</sup> Restraint of trade law, then, was primarily concerned with private contract rights; indeed, only a contracting party could raise the issue, and then only to *avoid* paying damages for his breach of a contract that he asserted was unenforceable.<sup>295</sup> The public's interest was largely second-

287. See, e.g., *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 907 n.29; Harris & Liberman, *supra* note 6, at 612 n.5. See also Letwin, *supra* note 278, at 373, 384.

288. *Chesman v. Nainby*, 2 Ld. Raym. 1456, 92 Eng. Rep. 447, (K.B. 1727).

289. *Davis v. Mason*, 5 T.R. 119, 101 Eng. Rep. 69 (K.B. 1793).

290. *Bunn v. Guy*, 4 East. 190, 102 Eng. Rep. 803 (K.B. 1803).

291. *Gale v. Reed*, 8 East. 79, 103 Eng. Rep. 274 (K.B. 1806).

292. 1 P. Wms. 181, 24 Eng. Rep. 347 (Ch. 1711).

293. *Id.* at 182, 24 Eng. Rep. at 348.

294. *Id.* at 185-86, 24 Eng. Rep. at 349.

295. See W. SANDERSON, *RESTRAINT OF TRADE* 123 (1926); R. WILBERFORCE, A. CAMPBELL & N. ELLES, *RESTRICTIVE TRADE PRACTICES & MONOPOLIES* § 204 (2d ed. 1966).

dary and was viewed as coextensive with the interests of the parties.<sup>296</sup> As Devlin has observed, "The idea that one might have a pernicious monopoly, which suited the parties but not the public, was left undeveloped in England until the Restrictive Trade Practices Act of 1965 gave it a comparatively feeble statutory life."<sup>297</sup>

American antitrust law, on the other hand, is primarily for the benefit of competition and consumers.<sup>298</sup> The public's interest is a central concern. Moreover, injured third parties may sue for treble damages stemming from the violation of antitrust laws.<sup>299</sup> Given this divergence of goals and civil enforcement methods, a good case can be made that English restraint of trade law is not sufficiently analogous to American antitrust law to merit further inquiry under the historical test in order to determine how structural issues were treated in common law courts handling restraint of trade cases. However, if a crude analogue is assumed and the inquiry is further pursued, it appears that whatever structural issues may have existed were tried at common law to judges, not juries.

In contract actions involving restraint of trade, before the questions of agreement or damages were reached, a threshold issue might be raised concerning whether or not the private restraint was "unreasonable." The court would then examine the fairness of the contract to the parties, which in turn depended upon the scope and extent of the particular limitation.<sup>300</sup> Whatever limitation was necessary to protect the benefited party from the other's competition was reasonable; whatever exceeded that standard was unreasonable and hence unenforceable. It is this determination that might be said to involve crude market structure issues, because a rough idea of the scope of the benefited party's market was arguably necessary in order to decide whether a restraint was reasonable or unreasonable.<sup>301</sup>

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296. See Devlin, *supra* note 12, at 85; Letwin, *supra* note 278, at 379.

297. Devlin, *supra* note 12, at 85.

298. *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962); text accompanying note 183 *supra*.

299. See Clayton Act § 4, 15 U.S.C. § 15 (1973); W. SANDERSON, *supra* note 295, at 123; Letwin, *supra* note 278, at 385.

300. See Letwin, *supra* note 278, at 377.

301. Although the case of *Horner v. Graves*, 7 Bing. 735, 131 Eng. Rep. 284 (C.P. 1831), was decided forty years after 1791, it nevertheless gives a good example of the kind of inquiry that was made concerning the question of the reasonableness of a restraint of trade. The defendant had given a bond of £1000 in his Articles of Apprenticeship as a dentist not to practice within 100 miles of York. At issue, said the court, was whether the "restraint is larger than the necessary protection of the party. . . . No certain, precise boundary can be laid down, within which the restraint would be reasonable, and beyond which excessive." *Id.* at 743-44, 131 Eng. Rep. at 287. Distinguishing *Bunn v. Guy*, 4 East. 190, 102 Eng. Rep. 803 (K.B. 1803), which had upheld a 150 mile restraint of trade for an attorney, the court in *Horner* added,

But it is obvious that the profession of an attorney requires a limit of a much larger



However, at common law in England in 1791 it was quite clear that judges—not juries—decided whether or not a restraint of trade was unreasonable, and therefore decided also any market structure issues that might have been included in that determination. This principle was established firmly in *Mitchel v. Reynolds*,<sup>302</sup> an action of debt on a bond. The defendant, a baker, had sold his business and the lease on his shop to the plaintiff, giving a £ 50 bond and promising not to compete as a baker within the same parish of London during the five year lease term. The defendant pleaded that the bond was void and the plaintiff demurred. Finding the restraint reasonable and upholding the plaintiff's demurrer, the court made clear that the question of reasonableness was for the judge to decide:

It was further objected, that a promise is good, and a bond void; because the former leaves the matter more at large to be tried by a jury; but what is there to be tried by a jury in this case? [I answer] 1st, It is to be tried whether upon consideration of the circumstances, the contract be good or not? And that is a matter of law, not fit for a jury to determine.<sup>303</sup>

Subsequent cases all reach the same conclusions.<sup>304</sup>

It might seem that because the "reasonableness" of a noncompetition covenant necessarily concerns facts, such as the size of market that would support a tradesman or practitioner and from which he might justifiably seek to exclude others, the question would be jury tried. "Reasonableness," however, was routinely treated as a matter of law for the judge to decide: "It has always been the rule that the question of reasonableness is one of law for the court, to be determined after

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range, as so much may be carried on by correspondence or by agents. . . . The nature of the occupation [of dentistry, by contrast] which is one that requires the personal presence of the practiser [sic] and the patient together at the same place, shows at once that the plaintiff has shut out the defendant from a much wider field than can be occupied beneficially by himself.

7 Bing. at 744, 131 Eng. Rep. at 287.

302. 1 P. Wms. 181, 24 Eng. Rep. 347 (Ch. 1711).

303. *Id.* at 195, 24 Eng. Rep. at 352.

304. See, e.g., *Chesman v. Nainby*, 2 Ld. Raym. 1456, 92 Eng. Rep. 447 (K.B. 1727); *Davis v. Mason*, 5 T.R. 119, 101 Eng. Rep. 69 (K.B. 1793); *Horner v. Graves*, 7 Bing. 735, 131 Eng. Rep. 284 (C.P. 1831); *Proctor v. Sargent*, 2 Man. & G. 20, 133 Eng. Rep. 647 (C.P. 1840). The matter was put most clearly to the court in *Mallan v. May*, 11 M. & W. 652, 152 Eng. Rep. 967 (Ex. 1843). The defendant's seventh plea was that the contract, which involved a bond by a dentist not to compete in London, "was . . . an . . . unreasonable . . . restriction of trade, and by reason thereof . . . wholly void." *Id.* at 657, 133 Eng. Rep. at 969. The plaintiff demurred specially that the defendant was pleading a matter of law as a matter of fact. The court sustained the plaintiff's demurrer:

We need hardly add, that the latter part of the seventh plea, which is pleaded to that breach, is bad, for the cause assigned for special demurrer. It attempts to leave matter of law, viz. the reasonableness or unreasonableness of the contract, to the jury. This is clearly a question of law, and was decided as such in *Davis v. Mason*, *Warner v. Graves*, *Proctor v. Sargent*, and *Chesman v. Nainby*.

*Id.* at 668, 152 Eng. Rep. at 973. See also Devlin, *supra* note 12, at 84.

construing the contract and considering the circumstances existing when it was made . . . . It is not a matter of fact for a jury."<sup>305</sup> More recently this observation was confirmed by Devlin, who, after studying the issues decided by English juries in 1791, announced categorically that in England unreasonableness never became a jury question.<sup>306</sup>

That this should be so is perhaps not surprising, since, as Devlin notes,

[It was] the practice of the common law judges of withdrawing from a jury those questions of fact which they thought a jury would not understand or would not deal with to the satisfaction of the judges. This they did by the simple method of declaring them to be questions of law.<sup>307</sup>

It may not be possible ever to confirm that the actual reason judges tried questions of reasonableness was that juries were thought to be unable to handle such questions, as Devlin has suggested. It is nevertheless quite plain that such questions, along with whatever unarticulated market structure issues that may have been included in such questions, were not tried by English juries in 1791.

## 2. Monopolies

Although the term "monopoly" appears in early English cases and treble damages provisions can be found in the Statute of Monopolies of 1624,<sup>308</sup> English treatment of monopolies is even less analogous to modern antitrust law than the restraint of trade cases. While section 2 of the Sherman Act addresses the problem of private monopoly power and abuse, monopoly law in England in 1791 dealt only with official monopoly grants by the Crown, as Coke explained:

[A monopoly is] an institution or allowance from the king by his grant, commission, or otherwise, of or for the sole buying, selling, making, working, or using of anything whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.<sup>309</sup>

The Crown used this prerogative to grant monopolies for new trades or inventions (the crown monopoly is the predecessor of modern patent law), for supervising an industry or trade, or for taking over a

305. W. SANDERSON, *supra* note 295, at 49. See also Letwin, *supra* note 278, at 377.

306. Devlin, *Note on the Suit at Common Law in England at the Time of the Seventh Amendment (1791)* 46 (Dec. 1979) (commissioned by Wilmer, Cutler & Pickering, counsel for IBM Corporation, and later adapted as Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, *supra* note 12).

307. Devlin, *supra* note 12, at 83. See also J. BAKER, *supra* note 178, at 62:

Lawyers had to make sure that questions referred to these "lay folk" were questions they could not misunderstand; and so questions thought to be outside the competence of the jury had to be raised in advance before the judges. Matters which judges decided without juries became the common law, and discussions which occurred before the jury was summoned helped to refine and clarify the law.

308. 21 Jac. 1, c. 3 (1624).

309. Co. 3 Inst. 181, c. 85 (spelling inodernized). See also H. FOX, *supra* note 283, at 8.

previously established industry or trade.<sup>310</sup> The first category of monopoly grants was considered beneficial because it expanded English trade and encouraged invention.<sup>311</sup> The latter two categories of grants, however, were the cause of much complaint because the interference with trade provided only private gain for the monopolist without benefit to the public.<sup>312</sup>

Grants of monopoly, which had become a prime source of income for the Crown,<sup>313</sup> flourished under the reign of Queen Elizabeth and eventually covered an extraordinarily wide range of trade and manufacture, including everyday commodities and necessities.<sup>314</sup> By 1600, the public was pinched daily by monopolies and made to pay higher prices for goods that were often of lower quality.<sup>315</sup> In addition, the public suffered further from the enforcement measures taken by the monopolists. Holders of monopoly grants were able to enforce their patents and punish infringers by initiating actions in the common law courts, but they preferred to take their cases to Chancery, the Privy Council, or the Star Chamber because of the favorable treatment accorded monopolists in those forums.<sup>316</sup> Monopolists, however, often found it unnecessary to use the courts, because their patents of monopoly commonly granted them the right of self-help to search and seize any infringing goods. This power was abused and gave rise to a system of extortion and plunder.<sup>317</sup> One commentator cites the example of the saltpetre monopoly: "[T]he patentees of saltpetre, having the power of entering into houses, stables, and cellars and of searching wherever they suspected saltpetre might be gathered, used the authority as a means of extorting money from those who desired to escape such trouble and damage."<sup>318</sup> The public outcry over the abuse and oppression perpetrated by monopolies reached a peak in 1601 when the matter was debated in Parliament and corrective legislation was threatened.<sup>319</sup> The Queen, however, was able to rescue the prerogative

310. See H. FOX, *supra* note 283, at 62-65; Davies, *Further Light on the Case of Monopolies*, 48 L.Q. REV. 394, 397-98 (1932).

311. H. FOX, *supra* note 283, at 57; Davies, *supra* note 310, at 397.

312. H. FOX, *supra* note 283, at 57, 63-64.

313. G. AYLMER, *A SHORT HISTORY OF 17TH CENTURY ENGLAND: 1603-1689*, 61-62 (1963); H. FOX, *supra* note 283, at 66, 70; R. LOCKYER, *TUDOR & STUART BRITAIN 1471-1714*, 214 (1964); C. RUSSELL, *THE CRISIS OF PARLIAMENTS* 250 (1971).

314. See, e.g., H. FOX, *supra* note 283, at 70-71.

315. *Id.* at 70-71; W. SANDERSON, *supra* note 295, at 88-89; R. WILBERFORCE, A. CAMPBELL & N. ELLES, *supra* note 295, §§ 129, 133.

316. See H. FOX, *supra* note 283, at 75 n.74, 118, 123-24; Letwin, *supra* note 278, at 362. See also Davies, *supra* note 310, at 399-402.

317. H. FOX, *supra* note 283, at 70, 131; J. GORDON, *MONOPOLIES BY PATENTS* 257-58 (1897).

318. H. FOX, *supra* note 283, at 72.

319. See *id.* at 71, 75; W. SANDERSON, *supra* note 295, at 88.

right through her famous "golden speech"<sup>320</sup> and her Proclamation<sup>321</sup> that questions concerning the validity of patents would be tried at common law. Notwithstanding the Queen's promises and the decision in *Darcy v. Allen*,<sup>322</sup> declaring a Crown-granted playing card monopoly void under the common law,<sup>323</sup> monopolies continued and so did their abuses. Finally, in 1624 Parliament passed the Statute of Monopolies.<sup>324</sup> One commentator has characterized the Statute as "the only legislative measure of importance gained by the Commons during a struggle of more than twenty years to restore and to fortify their own and their fellow subjects' liberties."<sup>325</sup>

Section 1 of the Act<sup>326</sup> declared all monopolies void, thus confirming the earlier common law holdings<sup>327</sup> and incorporating sentiments previously expressed by King James in his *Book of Bounty* in 1610.<sup>328</sup> However, two important exceptions were made to this general prohibition. Section 9 created a gaping hole in the Act by providing that the Act should not apply to cities, corporations, trade guilds, or societies of merchants within the Realm that were erected for the maintenance, enlargement, or ordering of any trade of merchandise.<sup>329</sup> Thus, while section 1 brought an end to private grants of individual monopoly, section 9 provided the basis for a resurgence of Crown monopoly grants to

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320. Russell records that once the Queen recognized the intensity of agitation in Parliament concerning monopolies, "She called a deputation from the Commons before her, and promised them redress. She expressed sorrow and indignation that her grants should have been abused to oppress her subjects, and said:

I do assure you there is no prince that loves his subjects better, or whose love can countervail our love. There is no jewel, be it of never so rich a price, which I set before this jewel: I mean your love. For I do esteem it more than any treasure or riches: for that we know how to prize, but love and thanks I count unvaluable. And though God hath raised me high, yet this I count the glory of my crown, that I have reigned with your loves. . . . That my grants should be grievous to my people, and oppressions privileged under colour of our patents, our kingly dignity shall not suffer it. Yea, when I heard it, I could give no rest unto my thoughts until I had reformed it.

C. RUSSELL, *supra* note 313, at 250-51 (footnote omitted). See also H. Fox, *supra* note 283, at 76-77.

321. H. Fox, *supra* note 283, at 77-78; Davies, *supra* note 310, at 403-04.

322. *Darcy v. Allen*, 11 Co. Rep. 84b, 77 Eng. Rep. 1260 (K.B. 1602).

323. See generally Davies, *supra* note 310.

324. 21 Jac. I, c. 3 (1624).

325. H. Fox, *supra* note 283, at 116-17 (footnote omitted).

326. Statute of Monopolies, 21 Jac. I, c. 3, § 1 (1624). A facsimile of the Statute of Monopolies is reprinted in full in H. Fox, *supra* note 283, at 338-42.

327. See, e.g., *Darcy v. Allen*, 11 Co. Rep. 84b, 77 Eng. Rep. 1260 (K.B. 1602); *Davenant v. Hurdis*, Moore 576, 72 Eng. Rep. 769 (K.B. 1599).

328. See *The Case of the Tailors of Ipswich*, 11 Co. Rep. 53a, 77 Eng. Rep. 1218, (K.B. 1615) (employing language of the *Book of Bounty*). See also H. Fox, *supra* note 283, at 96-97; Hulme, *The History of the Patent System Under the Prerogative and at Common Law*, 16 L.Q. REV. 44 (1900); A facsimile of the *Book of Bounty* is reprinted in full in H. Fox, *supra* note 283, at 330-35.

329. 21 Jac. I, c. 3, § 9 (1624).

corporations, cities, guilds, and trading companies.<sup>330</sup> The other exception of note was created by sections 5 and 6 in favor of limited-term patents for new inventions.<sup>331</sup>

The two sections of the Act that might be thought to have some relevance to Seventh Amendment questions of the right to jury trial of market structure issues are sections 2 and 4. Section 2 provided that questions concerning the force and validity of monopoly grants were to be tried at common law and not otherwise.<sup>332</sup> The Act thus confirms the common law jurisdiction that had been exercised earlier by courts of law.<sup>333</sup>

That questions of validity were consigned to common law courts, however, does not mean that market structure issues were considered or that juries were involved. Rather, it appears that market structure issues of the sort involved in modern antitrust litigation played no role in the determination of the validity of a monopoly, because, to the extent "markets" were involved at all, they were already defined by the terms of the Crown grant under consideration. For example, a monopoly might grant a patentee the exclusive authority to import or manufacture playing cards and sell them throughout the realm.<sup>334</sup> Alternatively, a charter might be granted to a corporation of soapmakers, giving its members exclusive authority to sell soap within a particular area.<sup>335</sup> In each case, the terms of the grant defined the relevant product and geographic markets and established the patentee's market power within that market. Accordingly, it is not surprising that the cases considering the validity of monopoly grants do not consider market structure issues. Instead, these cases tend to involve matters of statutory construction and the proper interpretation of the terms of the Crown grant, questions of law that were decided by the court.

*East India Co. v. Sandys* (The Great Case of Monopolies),<sup>336</sup> is typical. The issue was whether the charter of the East India Company allowed it to exclude private traders from India. Market definition, firm market share, and firm power, as those terms are understood in modern antitrust litigation, were established by the monopoly grant itself. The only question was whether the grant was a monopoly within the terms of the Statute of Monopolies, and thus illegal. The court held that foreign trade fell outside the scope of the Act and that, in any case, the Company's charter was not a monopoly, because the grant did not

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330. H. Fox, *supra* note 283, at 127-39; Letwin, *supra* note 278, at 367.

331. Statute of Monopolies, 21 Jac. 1, c. 3, §§ 5, 6 (1624).

332. *Id.* § 2.

333. See note 327 *supra*.

334. Darcy v. Allen, 11 Co. Rep. 84b, 85a, 77 Eng. Rep. 1260, 1260-61 (K.B. 1602).

335. Hays v. Harding, Hardres 53, 55, 145 Eng. Rep. 376, 377 (Ex. 1656).

336. 10 St. Tr. 371, 2 Show, 366, 89 Eng. Rep. 988 (K.B. 1684).

deprive English citizens of any pre-existing freedom or liberty.<sup>337</sup>

It might be argued that the question of validity, at bottom, turns upon whether the grant was a monopoly or a reasonable regulation of trade,<sup>338</sup> which in turn requires consideration of at least crude market structure issues. However, even if this were so—and the cases do not suggest such an argument—the question of the validity of monopoly grants was considered a question of law and was decided by common law judges, both before the Statute of Monopolies<sup>339</sup> and after.<sup>340</sup> It was remarkable enough that the question of the validity of Crown grants of monopoly had been removed from the conciliar courts to the courts of common law.<sup>341</sup> It would have been inconceivable to take the next step and ask common juries of “lay folk” to pass upon the validity of acts of the Crown.<sup>342</sup>

337. In upholding the monopoly, Jefferies, L.C.J. stated, “Now if the subjects of England had not, before this grant, a freedom and liberty to trade to the Indies, against the king’s royal pleasure, the charter at the bar will be no monopoly within that rule.” 10 St. Tr. at 542. Jefferies’ interpretation of illegal monopoly parallels the definition given by Coke. See note 309 *supra*.

338. The distinction between monopoly and reasonable regulation of trade was recognized in *Hays v. Harding*, Hardres 53, 55, 145 Eng. Rep. 376, 377 (Ex. 1656); see Letwin, *supra* note 278, at 366-67.

339. See, e.g., *The Case of the Tailors of Ipswich*, 11 Co. Rep. 53a, 77 Eng. Rep. 1218 (K.B. 1615); *The Case of the City of London*, 8 Co. Rep. 1216, 77 Eng. Rep. 658 (K.B. 1610); *Darcy v. Allen*, 11 Co. Rep. 84b, 77 Eng. Rep. 1260 (K.B. 1602); *Davenant v. Hurdis*, Moore 576, 72 Eng. Rep. 769 (K.B. 1599). In 1601, in the debate on monopolies, Sir Francis Bacon made mention of other early, but unreported, cases where judges quite clearly decided the question of validity. See H. Fox, *supra* note 283, at 119 n.21. In 1621, Coke delivered a speech concerning monopolies in which he also cited a number of recorded cases in which judges decided the question of validity. See *id.* at 121-22 n.30. See also *id.* at 106 (indicating that in 1621 a precursor of the Statute of Monopolies was introduced in Parliament declaring that what constituted a monopoly was a question to be defined by the “Judges of the Law.”); Letwin, *supra* note 278, at 362, 363.

340. See, e.g., *Woolley v. Idle*, 4 Burr. 1951, 98 Eng. Rep. 16 (K.B. 1766); *Bodwic v. Fennell*, 1 Wils. 233, 95 Eng. Rep. 592 (K.B. 1748); *Mayor of Winchester v. Wilks*, 1 Salk 203, 91 Eng. Rep. 181 (K.B. 1705); *East India Co. v. Sandys*, 10 St. Tr. 371, 2 Show. 366, 89 Eng. Rep. 988 (K.B. 1684).

341. Fox reports the preeminence of the conciliar courts in such matters at the beginning of the 17th Century:

[M]atters involving letters patent and grants of monopolies and other privileges were rarely, if ever, heard in the common law courts. . . . Grants of this type were, generally speaking, based on an exercise of the royal prerogative, and it was not thought fitting or consonant with the royal dignity that questions concerning their propriety should be discussed and considered in the ordinary courts of common law. Instead, such questions were heard and determined either by the Privy Council itself or before one or other of the conciliar courts such as the Court of Star Chamber. Actions at law concerning patents were to all intents and purposes, forbidden.

H. Fox, *supra* note 283, at 120.

342. Research discloses one possible exception. *The Master, Wardens and Assistants of Silk Throusters v. Freinantee*, 2 Keb. 309, 84 Eng. Rep. 193 (K.B. 1668) was an action of debt for the penalty imposed by a local guild by-law. After trial by jury resulted in a judgment for the plaintiffs, the defendant moved to arrest the judgment, raising the question of the reasonableness of the by-law. The court held, “per Curiam . . . , the reasonableness was the point tried; and this is found by the jury.” The motion was then denied. It is difficult to know from this brief report whether the jury was actually permitted to consider the question of validity. Moreover, there is no

Nor does section 4 of the Statute of Monopolies support any attempt to draw from the Act a rough analogue of jury decision of market structure issues. That section provided that persons who were "hindered, grieved, disturbed, or disquieted" or whose goods or chattels were "seized, attached, distrained, taken, carried away, or detained, by occasion or pretext of any monopoly" could sue for treble damages and double costs in the courts of the common law.<sup>343</sup> The meaning of this section is uncertain. Coke offers no real explanation of it in his commentary to the *Institutes*, and, as will be seen, the section was not examined by the courts until 1898. Its language and the political context in which the Act was passed suggest that section 4 was aimed at providing a remedy for the abuses by monopolists of their search and seizure powers, which often included extortion, confiscation of goods, or damage to goods and property.<sup>344</sup> It was not the basis for a third-party action to recover lost profits or overpayments caused by the existence of the monopoly or the predatory actions of the monopolist. This narrow understanding of section 4 was confirmed in 1898 by *Peck & Co. v. Hindes, Ltd.*,<sup>345</sup> the only case ever brought under that section of the Act.<sup>346</sup> Thus, section 4 does not appear to be an analogue to the modern antitrust action for treble damages.

Even if section 4 were read more broadly to encompass actions for general economic harm caused by a monopoly, litigation under that section in 1791 still would not have involved market structure issues. As noted earlier, those issues do not appear to have arisen in cases concerning monopolies granted by the Crown, because the terms of the grant define the monopolist's market and its power within that market. Litigation under section 4 would have involved only issues of conduct and damages. Finally, since the only case arising under this section did not occur until 1898, no contrary evidence appears to exist suggesting that English juries actually did try market structure issues in 1791. In the absence of such evidence, section 4 of the Statute of Monopolies does not supply the necessary historical analogue to warrant jury trial of such issues in modern antitrust litigation.

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evidence whatsoever that the jury considered any market structure issues. Indeed, the likelihood is that they did not, since the monopoly of the guild was clearly established by government charter. The question appears to have been whether a particular by-law, not the charter grant itself, was reasonable.

343. 21 Jac. 1, c. 3 § 4 (1624) (spelling modernized).

344. See note 317 *supra*; H. Fox, *supra* note 283, at 64, 70, 72, 75, 115.

345. 15 Pat. Cas. 113 (Q.B. 1898).

346. See H. Fox, *supra* note 283, at 117; Fox, *Abuse of Monopoly*, 23 CAN. B. REV. 353, 366 (1945).

### 3. *Forestalling, Regrating, and Engrossing*

The English laws pertaining to forestalling, regrating, and engrossing appear to have dealt with private monopoly power, but only in the context of efforts to preserve England's regulated mercantile system. Together, these laws attempted to prevent private citizens from trading outside the established legal markets. One result of these restrictions was to prevent dealers or speculators from "cornering a market" and thereby reaping the benefits of monopoly pricing.<sup>347</sup> Forestalling was the buying of goods outside the regular system of public, government-regulated markets.<sup>348</sup> Regrating meant something akin to commodities speculation: purchasing foodstuffs in a market and later retailing them within four miles of the original market.<sup>349</sup> Engrossing was the buying of grain or other "dead victuals" at wholesale in order to later wholesale the goods again, adding one more "middle man" to the chain of distribution.<sup>350</sup> These offenses had common law roots, but eventually were specifically prohibited by statute.<sup>351</sup>

While these laws might appear somewhat analogous to modern antitrust prohibitions against monopolizing, they served entirely different purposes and were not part of a system of compensatory civil relief. Modern antitrust laws seek to foster competition. The laws concerning forestalling, regrating, and engrossing, on the other hand, were designed to protect a government-created and government-regulated system of public markets in which trade was generally ordered.<sup>352</sup> These laws were also enforced to ensure that revenues were generated for the holders of public market monopolies and, in turn, for the Crown.<sup>353</sup> It was with this background in mind that Letwin declared, "Clearly, then, the laws against forestalling and engrossing, which some have tried to identify as a fount of modern antitrust law, did not have the required character."<sup>354</sup> In addition, these English laws were criminal, and thus were not designed to provide private, civil relief for anticompetitive behavior. Offenders were prosecuted and fined or sent to jail.<sup>355</sup> To the extent private plaintiffs were involved at all, it was

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347. See generally W. ILLINGWORTH, *AN INQUIRY INTO THE LAWS, ANTIENT AND MODERN, RESPECTING FORESTALLING, REGRATING, AND INGROSSING* (1800). See also W. SANDERSON, *supra* note 295, at 94-99; Letwin, *supra* note 278, at 367-73.

348. See 5 & 6 Edw. 6, c. 14, § 1 (1552).

349. See *id.* § 2.

350. See *id.* § 3; W. HOLDSWORTH, *supra* note 27, at 375; W. ILLINGWORTH, *supra* note 347, at 15.

351. 5 & 6 Edw. 6, c. 14 (1552). These statutes are excerpted in R. WILBERFORCE, A. CAMPBELL & N. ELLES, *supra* note 295, §§ 121-124, at 26-27. See also Letwin, *supra* note 278, at 368-69.

352. See Letwin, *supra* note 278, at 369.

353. See *id.* at 368, 370.

354. *Id.* at 373.

355. W. SANDERSON, *supra* note 295, at 96; Letwin, *supra* note 278, at 368.



only in the limited role of an informer, where the private party was permitted to prosecute the offender and retain a portion of any fine set by the judge.<sup>356</sup> The action, then, differed substantially from a third-party civil action for compensatory and treble damages.

In any case, it does not appear that market structure issues played a role in forestalling, regrating, and engrossing cases. To the extent that it was necessary to identify a public market in a particular case, the definition would have been set forth in the grant from the Crown or a city's charter. The crimes themselves appear to have involved rather straightforward questions of conduct concerning what the defendant actually did and what his intentions were. Moreover, by 1791 prosecutions in England for forestalling, regrating, and engrossing were virtually at an end.<sup>357</sup> The primary statutory prohibitions were repealed in 1772<sup>358</sup> following a committee report to the House of Commons that these laws had been a source of the rise in the price of corn throughout the kingdom.<sup>359</sup> The preamble to the Act demonstrates the awakening that was taking place concerning the merits of free trade:

[I]t hath been found by experience that the restraints laid by several statutes upon the dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing a free trade in the said commodities, have a tendency to discourage the growth, and to inhanche the price of the same.<sup>360</sup>

Thus, forestalling, regrating, and engrossing cases do not appear to provide an historical basis for "preserving" market structure issues for jury trial today.<sup>361</sup>

356. J. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE* 44 (1974); see, Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J.L. HIST. 313 (1973); J. Limprecht, *Common Informers and Law Enforcement in England 1603-1640*, 4, 12, 25 (1975) (unpublished dissertation on file at the Library of the University of California, Berkeley).

357. See W. SANDERSON, *supra* note 295, at 96-97; Letwin, *supra* note 278, at 371-72.

358. See W. SANDERSON, *supra* note 295, at 97; Letwin, *supra* note 278, at 371-72.

359. The common law basis for prosecutions was also later prohibited by an Act of Parliament, 7 & 8 Vic., c. 24 (1844).

360. 12 Geo. III, c. 71 (1772) (spelling modernized).

361. The court in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 907 n.29, cited the Statute of Labourers, 23 Edw. 3, c. 6 (1349) as an analogue to modern antitrust law and as evidence that a right to jury trial exists. Reliance on this Act, however, is misplaced. First, like the statutes prohibiting forestalling, regrating, and engrossing, the Statute of Labourers was basically a criminal statute, which permitted enforcement by informers, who shared in the fines levied. It was not a statute creating a right to recover damages for injuries received. The fines were set forth in the statute itself. In addition to fines, the statute provided for jail terms for certain offenses. See B. PUTNAM, *THE ENFORCEMENT OF THE STATUTE OF LABOURERS DURING THE FIRST DECADE AFTER THE BLACK DEATH, 1349-1359*, 82 (1908). Second, the Act had little to do with competition or competitive injury, as Letwin observes:

Legislation governing wages and conditions of labor began with the Ordinance of Labourers passed in 1349, which was confirmed and extended by numerous later statutes. In the sixteenth century, these occasional laws were consolidated in the great Elizabethan Statute of Artificers, which governed apprenticeship and wages, and in the Act of

*D. Lessons of History*

Actual historical analysis of antitrust issues yields a number of conclusions concerning the allocation of decisionmaking between judge and jury in England in 1791. First, it appears certain that juries were accustomed to deciding conduct and damage issues in common law trials. Second, market structure issues, as used in modern antitrust litigation, do not appear to have existed in England in 1791. Moreover, close historical analogues to market structure issues do not appear to have been present in the closest English historical counterparts to modern antitrust laws—restraint of trade; monopoly; and forestalling, regrating, and engrossing. Third, even assuming that those English laws are sufficiently close historical analogues to modern antitrust laws to warrant study of the allocation of decisionmaking between judge and jury in cases arising under those laws, historical research indicates that, to the extent market structure issues were considered at all, they were decided by judges, not juries. Thus, while the Seventh Amendment preserves jury trial of conduct and damage issues, it does not preserve jury trial for market structure issues because none were tried by juries in England in 1791. The conclusion, then, that can be drawn from historical analysis is that judges are free in modern antitrust litigation to decide market structure issues without a jury.<sup>362</sup> Limited exceptions to this general conclusion may exist, and certainly questions of procedure remain to be answered, including the timing of proof of jury and non-jury issues. These issues are addressed in the next part.

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1548, which provided criminal penalties against any workmen who conspired or agreed to raise wages or reduce hours of labor. But there was no thought in these statutes of making it possible for workmen to compete; on the contrary, the sixteenth century legislators who passed these laws to fix the terms and wages of labor hoped to recapture the economic stability that had been shaken by the Black Death, the movement of men from manors to towns, and the early industrial revolution. They wanted competition no more than they understood it. Although these laws, like others of the time, appear, in the light of later developments and interpretation, to express antagonism to monopolistic arrangements and approval of competition, they were really intended to reinforce the system of direct economic control.

Letwin, *supra* note 278, at 379-80 (footnotes omitted). See also M. KEEN, *ENGLAND IN THE LATER MIDDLE AGES* 173 (1973).

362. Two-stage historical analysis on an issue-by-issue basis may suggest that changes should be made in other areas of substantive law concerning the allocation of decisionmaking between judge and jury. It is not within the scope of this Article to conduct such an analysis, but the antitrust analysis conducted here may provide a useful model for others who may wish so to scrutinize other areas of law.

## IV

PROCEDURES FOR THE TRIAL OF MARKET  
STRUCTURE ISSUES*A. Who Should Decide*

Because the Seventh Amendment does not preserve the right to jury trial for market structure issues, a reallocation of decisionmaking authority between judge and jury in modern antitrust litigation would appear to be in order. Conduct and damage issues must continue to be jury tried. Market structure issues, however, must be tried to a judge,<sup>363</sup> unless the parties stipulate and the court agrees to a jury trial<sup>364</sup> or the court decides to use an advisory jury.<sup>365</sup> In the absence of consent by all parties, the court has no authority to order jury trial of market structure issues.<sup>366</sup> Moreover, should an advisory jury be used, the responsibility for ultimate decision, including the preparation of findings of fact and conclusions of law, remains with the trial judge.<sup>367</sup>

*B. When Should Decision Be Made*

Rule 42(b) of the Federal Rules of Civil Procedure permits the trial judge, upon motion of a party or sua sponte,<sup>368</sup> to order the separate trial of issues "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy . . . ."<sup>369</sup> The entry of such an order and the timing of the separate trial itself rest within the sound discretion of the trial court.<sup>370</sup> However, in those antitrust suits in which the determination of market structure issues is likely to be dispositive or highly predictive of outcome, advantage may be gained by separately trying market structure issues as soon as practicable.<sup>371</sup>

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363. When an issue is not committed to jury trial by the Constitution or a federal statute, Rule 39 of the Federal Rules of Civil Procedure requires decision by the trial judge. Such issues may be separated for judicial decision on motion of one of the parties or upon the court's initiative. 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2332, at 109.

364. FED. R. CIV. P. 39(c); 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2333, at 110, 111.

365. FED. R. CIV. P. 39(c); 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2335, at 124-28.

366. "If there was no right to jury trial on a particular issue, the court may resort to Rule 39(c) to order an advisory jury or, with the consent of all parties, a regular trial by jury, but it may not do so on motion by one party under Rule 39(b)." 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2334, at 113.

367. *Id.* § 2335, at 125-26.

368. FED. R. CIV. P. 42(b); 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2337, at 130, § 2388, at 279.

369. FED. R. CIV. P. 42(b). See 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2387, at 277-78.

370. 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2388, at 283-84.

371. See, e.g., Joskow & Klevorick, *supra* note 203, at 260-62; Note, *supra* note 260, at 790 n.103. See also Decker & Allard, *Separation and Separate Presentation of Issues in Antitrust Cases*, 4 CORP. PRACTICE COMM. 40 (1962); ANTITRUST MONOGRAPH, *supra* note 3, at 62-77.

First, early resolution of market structure issues may help weed out unmeritorious claims. In many instances a plaintiff must first establish that the defendant possesses a certain threshold of market power (usually gleaned from market share), before plaintiff's allegations of defendant's anticompetitive conduct and claims of resulting damage will be considered. For example, at present, a claim of monopolization under section 2 of the Sherman Act cannot be sustained unless the plaintiff proves that the defendant controls at least fifty percent of the relevant market.<sup>372</sup> Or, in order to establish a claim that a defendant's method of product distribution constitutes an unreasonable restraint of trade in violation of section 1 of the Sherman Act, a plaintiff may be required first to establish that the defendant's market share exceeds at least one percent of the relevant market.<sup>373</sup> An early trial of market structure issues may disclose that the plaintiff cannot meet its burden of proving threshold market requirements, thereby establishing the basis for an early dismissal. The culling out of such cases at an early stage of the litigation preserves judicial resources, protects defendants from harassment and strike suits, and prevents excessive and unnecessary expenditure of time and money on discovery of conduct and damage issues.

Second, even in cases in which the plaintiff can establish threshold requirements easily, early resolution of market structure issues may be desirable because it may enhance the possibility of early settlement. Often, although the defendant's conduct is not seriously in question, settlement may remain out of reach because the parties are not able to agree upon the definition and scope of the relevant market or the defendant's market share, issues of considerable consequence in the calculation of damages. An early resolution of market structure issues would remove this wild card from the bargaining table and would permit the parties to deal more rationally with each other.<sup>374</sup>

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Summary judgment has not been an adequate vehicle for this task because market structure issues almost always involve a "genuine issue [of] material fact." See FED. R. Civ. P. 56(c); *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *Bedi Photographic Corp. v. Polaroid Corp.*, No. 76-1107 (E.D. Pa.), 980 ATTR. A1-3 (Sept. 11, 1980); *Reliable Volkswagen Sales & Service Co. v. World-Wide Auto. Corp.*, 34 F.R.D. 134 (D.N.J. 1963). See generally *Louis, Federal Summary Judgement Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974).

372. See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *Heattransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 294 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). But see *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977).

373. See cases cited notes 258-60 *supra*. Threshold market structure requirements also exist for other substantive antitrust offenses, including requirements contracts, mergers, and tie-ins. See, e.g., text accompanying notes 258-60 *supra*.

374. As one participant in a panel sponsored by the Antitrust Section of the American Bar Association noted:

Third, discovery and trial of conduct and damage issues are likely to be more focused if the issues of market structure are decided first. Definition of the relevant market, for example, may limit the scope of discovery and the amount of evidence introduced at trial by limiting the required proof to specifically defined product and geographic markets. While these effects are difficult to assess before courts have substantial experience, it is probable that a savings in pretrial and trial time will result.<sup>375</sup>

Of course there may be particular cases which do not warrant the separation or early trial of market structure issues. In cases in which it is too difficult to decide at the outset whether per se analysis or rule of reason analysis should apply, for example, market structure issues may sidetrack the more important problem of characterizing the defendant's activity.<sup>376</sup> Indeed, early determination of market structure issues might waste time and money in cases in which conduct was eventually determined to fall within a per se rule, since such cases can dispense with market structure analysis altogether. In such circumstances a court would probably be prudent to delay consideration of market structure issues until it was clear that rule of reason analysis was appropriate. Another example may be rule of reason cases in which the plaintiff is plainly able to meet the de minimis requirements respecting the defendant's market power. To be sure, market structure issues do have a continuing role in determining whether conduct was unreasonable, but the importance of such issues, relative to conduct issues, may not be so special as to merit separate and early treatment. There also may be cases in which there will be little economy involved in the separate trial of market structure issues, or in which market structure issues are so enmeshed in other issues that separation may confuse rather than aid the subsequent jury trial of conduct and damage issues.<sup>377</sup> In each of these cases, market structure issues will still have to be decided

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[T]here is the possibility of resolving some so-called preliminary issues through a separate trial of those issues after discovery is closed. If those issues are resolved in favor of the defendant, very often the case will go away. Sometimes if they are resolved in favor of the plaintiff, it will result in a settlement. . . . For example, in one case in which I was involved the crucial question was the definition of the market, because the market shares changed dramatically depending on how it was defined. *A preliminary trial of the market issue lasting about two weeks resulted in the settlement of the case.* The trial of the whole case would have been a matter of months.

ANTITRUST MONOGRAPH, *supra* note 3, app. C, at 111 (emphasis added). Procedures that promote settlement are certainly to be encouraged, particularly in an era of increasing antitrust litigation. See, e.g., Berman, Dallas, Getman, Rich, Schiller & Weinrich, *Pretrial Aspects of a Small Antitrust Case*, 45 BROOKLYN L. REV. 245, 247 *im.* 1-5 (1979).

375. See, e.g., ANTITRUST MONOGRAPH, *supra* note 3, at 73-75; Joskow & Klevorick, *supra* note 371, at 260-62.

376. See L. SULLIVAN, *supra* note 1, at 72-74, 81, 83, 86, 93, 98-101 (1977).

377. See, e.g., *United States v. IBM Corp.*, 60 F.R.D. 654 (S.D.N.Y. 1973); *Reliable Volkswagen Sales & Service Co. v. World-Wide Auto. Corp.*, 34 F.R.D. (D.N.J. 1963).

by the trial judge, but discretion may dictate delay of the decision until the time of trial.<sup>378</sup>

Finally, in some cases market structure issues may be so closely intertwined with conduct or perhaps even damage issues that they share a common factual basis. In other words, the issues may overlap so significantly that the same facts must first be determined before the different issues can be resolved. This is not likely to occur often with respect to the structural issues of relevant market definition, firm market share or industrial concentration levels, because proof of such issues normally would not necessitate inquiry into the defendant's alleged anticompetitive conduct.<sup>379</sup> Occasionally, however, it might be difficult to resolve the issue of market power on the basis of structural evidence alone, making it necessary to resort to evidence of defendant's conduct.<sup>380</sup> In those limited circumstances, in order to preserve the Seventh Amendment right to jury trial for conduct issues, the jury must first resolve the underlying factual questions concerning conduct.<sup>381</sup> Thereafter, the court may decide the market power question in light of the jury's findings.<sup>382</sup> Even in cases where a determination of the defendant's market power requires this order of trial, however, a trial judge should not hesitate to try separately and as early as practicable the remaining structural issues that do not overlap with proof of conduct or damages.

### C. *What Procedures Should Be Employed*

In most cases courts will probably find it helpful to determine at

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378. If postponement of the resolution of market structure issues is thought warranted, a number of options are open to the court. The court may resolve such issues (a) shortly before trial, after a separate hearing, (b) after the evidence is presented at trial, but before instructions are given to the jury, or (c) a court might decide to submit the entire case to the jury, using the jury in an advisory capacity to decide the market structure issues. Since ultimate decision of such issues remains with the trial court, special interrogatories to the jury would probably be necessary to pinpoint and clarify the jury's advisory findings with respect to market structure issues.

379. See text accompanying notes 188-207 *supra*.

380. See text accompanying note 206 *supra*; *cf.*, *Janich Bros. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977) (even in the absence of direct proof of defendant's market power, plaintiff may establish its claims of attempted monopolization under the Sherman Act by demonstrating conduct by the defendant which is clearly threatening to competition).

381. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2338, at 134-35, § 2391, at 301-04. See also text accompanying notes 79-80 *supra*. In *Beacon*, the Court held that issues of fact common to separate legal and equitable issues joined in the same case must be tried by a jury in order to preserve the Seventh Amendment right to jury trial of legal issues. That same principle and ordering of trial should apply in a legal case which involves issues that historically were tried to a jury, as well as issues that were tried to a judge.

382. See 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2391, at 301-02. In order to identify and understand the jury's findings, the court should direct special interrogatories to the jury concerning those facts believed to be common to the issues that are to be jury tried and those that are to be judge tried.

an early stage what role market structure issues will play in the litigation and at what point the trial of such issues will be most beneficial and practicable. A pretrial conference may profitably be scheduled soon after the pleadings are answered,<sup>383</sup> with the parties directed to file statements prior to the conference outlining their respective contentions concerning market structure issues, their perceptions of the importance of such issues in the litigation, and their opinions concerning the usefulness of early discovery and trial of market structure issues. These statements, together with discussions at the pretrial conference, should give the court an adequate basis for deciding how to proceed in a particular case. In many cases the court will find it advantageous to determine market structure issues early. To this end, the court should consider entering an order scheduling discovery for market structure issues and establishing a hearing date for the presentation of evidence. In certain cases, where the resolution of market structure issues is likely to result in an early termination of the litigation, it might also be appropriate to limit discovery solely to market structure issues until those matters are resolved.<sup>384</sup> Additional pretrial conferences should be scheduled, as necessary, to monitor progress and resolve any developing problems.<sup>385</sup>

Because market structure issues are tried to the court, the hearing can be conducted with more flexibility and innovation than would be possible in a jury trial.<sup>386</sup> For example, the court might decide to make

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383. FED. R. CIV. P. 16; ANTITRUST MONOGRAPH, *supra* note 3, at 62-71.

384. See 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2387, at 278; 2 REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 38-39 (1979). The court should be cognizant in such a situation of the potential that exists for abuse by the defendant of a limited discovery order, see Decker & Allard, *supra* note 371, at 60-61. Generally, however, discovery of market structure issues will not require disclosure of the same documents relevant to the conduct and damages issues. Therefore, bifurcation of the discovery process may serve both to simplify the process by limiting its scope at each stage, and to shorten the process overall should settlement be reached after determination of the market structure issues.

385. A similar sequence of pretrial conferences has been suggested in ANTITRUST MONOGRAPH, *supra* note 3, at 64-65.

386. The advantages of a court trial of antitrust issues were recently emphasized by Judge Lacey in *Van Dyk Research Corp. v. Xerox Corp.*, No. 75-419 (D.N.J. Aug. 15, 1978), cited in Harris & Liberman, *supra* note 6, at 622 n.52:

Working together we have tried in approximately a month a case which originally we had all predicted would take at least three months to try. That we tried the matter without a jury was a proximate cause of this. While in most cases capable lawyers and a capable judge can try a case to a jury in the same time it could be tried non-jury, there is no question that a complex anti-trust case, involving thousands of documents, numerous depositions, and technical expert testimony about patents, refined technology and esoteric financial data, is tried much faster by a bench than a jury trial. Depositions need not be read into the record. Instead, they can be marked as exhibits and submitted to the court along with each side's narrative analysis. Lengthy exhibits can be submitted with counsel simply highlighting appropriate portions, accompanying their submissions with a digest of exhibits. The testimony of numerous experts can be shortened by submitting as exhibits their written curriculum vitae and abbreviating their testimony by introduc-

greater use of narrative statements and depositions of witnesses as a substitute for direct examination, limiting the hearing itself to cross-examination.<sup>387</sup> Or the court might engage in active questioning of witnesses or request supplemental briefing from counsel in order to clarify troublesome issues.<sup>388</sup> After the close of the hearing, the court should decide the market structure issues and enter appropriate findings of fact and conclusions of law at the earliest possible date.<sup>389</sup> In cases in which the plaintiff has failed to prove a relevant market or the threshold level of market power required to establish a certain offense, the court's findings and conclusions will be grounds for dismissal.<sup>390</sup> In other cases, the findings and conclusions concerning market structure issues will channel the remaining discovery and will form the basis for the court's charge to the jury concerning market structure issues and the manner in which the jury is to take the court's findings into account.

Of course a disappointed party may wish to appeal from the court's decision. However, unless a dismissal has resulted, the court's findings and conclusions, as well as the court's initial order to hold a separate trial of the market structure issues, are interlocutory only, for, as Professors Wright and Miller have noted, "There is no final judgment until all of the issues have been resolved and judgment entered on the whole case unless a lesser judgment is certified under the provision of Rule 54(b)."<sup>391</sup>

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ing only so much by way of facts and data as is necessary. These and other trial refinements, feasible in a non-jury trial, though not in a jury trial, enabled the former to be tried in a much shorter time than the latter.

387. Apparently, similar procedures have been employed in *JBL Enterprises Inc. v. Jhirmack Enterprises Inc.*, No. C-78-1227 (N.D. Cal. 1980), a case in which parties have stipulated to early and separate judicial resolution of market structure issues. See note 396 *infra*.

388. See FED. R. EVID. § 614 (a), (b); *In re Boise Cascade Sec. Litigation*, 420 F. Supp. 99, 104-05 (W.D. Wash. 1976). See also note 386 *supra*.

389. In appropriate cases, the court may wish to make its findings and conclusions on a tentative basis, subject to review and modification should subsequent discovery or evidence at trial indicate a change is necessary. This is presently the practice under FED. R. Civ. P. 23(c)(1), which permits an order respecting the certification of a class action to be made conditional and to be altered or amended prior to decision on the merits. See 7A C. WRIGHT & A. MILLER, *supra* note 21, § 1785, at 137-38; note 430 *infra*.

390. 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2575, at 692-95.

391. *Id.* § 2392, at 304. Of course, immediate appeal of interlocutory matters may be attempted pursuant to the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b). In appropriate cases, the District Court may certify an appeal if the stringent requirements of § 1292(b) are met. For a good discussion of the standards to be applied, see *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 942-46.

Until courts recognize that market structure issues are not preserved for jury trial by the Seventh Amendment, it is arguable that the initial decision of a trial court to resolve market structure issues separately and without a jury is an appropriate matter for appellate consideration through a writ of mandamus. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. at 511 & n.20; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540, slip op. at 42 (3d Cir. July 7, 1980).



The procedures outlined here are only suggestive of the approach that the trial court might employ to decide market structure issues. Courts should not hesitate to draw upon the reservoir of procedural and scheduling techniques already developed in other areas where issues have been separately tried. Bifurcated trials have commonly been used to resolve class action certification questions,<sup>392</sup> jurisdictional issues,<sup>393</sup> affirmative defenses,<sup>394</sup> and occasionally liability and damage issues in appropriate cases.<sup>395</sup>

The perceived advantages of bifurcation in those areas are likely to be present in antitrust cases as well. Indeed, procedures similar to those suggested here have already been employed successfully in one antitrust case to try market structure issues separately.<sup>396</sup> However, because the parties in that case stipulated to a court trial, the court did

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392. FED. R. CIV. P. 23(c)(1) provides: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." The Rule allows the trial court to manage the litigation in the most efficient and effective manner possible, *see* Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 104 note (1966) (Advisory Committee Note); Cohen, *Not Dead But Only Sleeping: The Rejection of the Death Knell Doctrine and the Survival of Class Actions Denied Certification*, 59 B.U. L. REV. 257, 259 (1979), including the timing of the class action ruling, *see* Garrett v. City of Hamtramck, 503 F.2d 1236, 1243-44 (6th Cir. 1974), the bifurcation of the class certification issue, *see, e.g.*, Green v. Wolf Corp., 406 F.2d 291, 301 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); *In re Sugar Antitrust Litigation*, 73 F.R.D. 332, 350-51 (E.D. Pa. 1976), separate discovery for class certification issues, *see, e.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 570 (2d Cir. 1968); Cobb v. Avon Products, Inc., 71 F.R.D. 652 (W.D. Pa. 1976), *appeal dismissed*, 565 F.2d 151 (3d Cir. 1977), and modification of the court's initial determination, if required, *see, e.g.*, General Motors v. City of New York, 501 F.2d 639, 646-47 (2d Cir. 1974); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 570 (2d Cir. 1968). *See generally* 6 MOORE ¶¶ 23.50, 23.75; 7A C. WRIGHT & A. MILLER, *supra* note 21, § 1792, at 194-200.

393. *See, e.g.*, McClain v. Real Estate Bd. of New Orleans, 100 S. Ct. 502 (1980); Gilbert v. David, 235 U.S. 561 (1915); ANTITRUST MONOGRAPH, *supra* note 3, at 49, 67, 83-85 (1979); 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2389, at 293.

394. *See, e.g.*, Seaboard Terminals Corp. v. Standard Oil Co., 30 F. Supp. 671, 672 (S.D.N.Y. 1939); 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2389, at 294.

395. 9 C. WRIGHT & A. MILLER, *supra* note 21, § 2390, at 296-300; *see, e.g.*, Lis v. Robert Packer Hospital, 579 F.2d 819, 824-25 (3d Cir.), *cert. denied*, 439 U.S. 955 (1978); Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16 (5th Cir. 1974). *But cf.* Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307 (5th Cir. 1976).

396. JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc., No. C-78-1227 (N.D. Cal. filed June 5, 1978) involved vertical restraint and tie-in claims under § 1 of the Sherman Act and § 3 of the Clayton Act. The parties stipulated to a court trial of the market structure issues and, the constitutional question thus removed, Judge Schwarzer entered a pretrial order scheduling those issues for early determination by the court. Following procedures similar to those suggested here, the court relied upon Rule 42(b) to separate the issues of relevant market definition, defendants' market share, and other threshold structural requirements present in tie-in cases. A limit of two months was imposed for discovery relating to market structure issues and a separate court trial of such issues was scheduled one month thereafter. Conduct issues concerning justifications and issues of injury and damages were reserved for later trial to a jury. (The author is grateful to Messrs. Eugene Crew and Mark LeHocky who brought this case to my attention after an early draft of this Article was in circulation.)

not reach the constitutional question concerning the right to trial by jury of market structure issues. Now, in view of the constitutional analysis presented in this Article, a party stipulation is not a predicate to obtaining the benefits of separate and early resolution of market structure issues in antitrust litigation.

#### D. Due Process Considerations

Some courts and commentators have suggested that certain cases may be so complex or protracted that trial by jury would violate the parties' Fifth Amendment due process right to a fair and competent factfinder.<sup>397</sup> This view was most recently asserted by the Third Circuit in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*<sup>398</sup> Cataloging the weaknesses of a jury in an unusually complex case, the court noted:

The long time periods required for most complex cases are especially disabling for a jury. A long trial can interrupt the career and personal life of a jury member and thereby strain his commitment to the jury's task. The prospect of a long trial can also weed out many veniremen whose professional background qualifies them for deciding a complex case but also prohibits them from lengthy jury service. . . . Furthermore, a jury is likely to be unfamiliar with both the technical subject matter of a complex case and the process of civil litigation. The probability is not remote that a jury will become overwhelmed and confused by a mass of evidence and issues and will reach erroneous decisions.<sup>399</sup>

This "probability" led the Court to conclude that:

[T]he most reasonable accommodation between the requirements of the

397. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540, slip op. at 32-36 (3d Cir. July 7, 1980); *In re Boise Cascade Sec. Litigation*, 420 F. Supp. 99, 104 (W.D. Wash. 1976); Harris & Liberman, *supra* note 6, at 620-27; Comment, *The Right to Strike the Jury Trial Demand in Complex Litigation*, 34 U. MD. L. REV. 243, 285-98 (1980); Note, *Incompetent Jury*, *supra* note 5, at 798-99.

398. No. 79-2540, slip op. (3d Cir. July 7, 1980), *rev'g and remanding for further hearings* *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 89 (E.D. Pa. 1979).

399. No. 79-2540, slip op. at 37 (3d Cir. July 7, 1980) (citation omitted). See text accompanying notes 5-6 *supra*. Current federal legislation prohibits the use of specially qualified or "blue ribbon" juries. See The Federal Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1874 (1976), which requires that jurors be "selected at random from a fair cross section of the community in the district or division where the court convenes." Some commentators, however, have urged that Congress reconsider the matter and pass new legislation authorizing the use of special juries in complex litigation. See Harris & Liberman, *supra* note 6, at 634-36; Note, *The Right to a Jury Trial in Complex Litigation*, *supra* note 5, at 915-17; Note, *The Right to Trial by Jury in Complex Litigation*, 20 WM. & MARY L. REV. 329, 352 (1978); Note, *The Case for Special Juries in Complex Litigation*, 89 YALE L.J. 1155 (1980). It is not at all clear, however, that such legislation would pass constitutional muster. Compare *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975); *Theil v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946); and *Glasser v. United States*, 315 U.S. 60, 86 (1942) with Note, *The Case for Special Juries in Complex Civil Litigation*, *supra*, at 1166-72.

fifth and seventh amendments [is] a denial of jury trial when a jury will not be able to perform its task of rational decisionmaking with a reasonable understanding of the evidence and the relevant legal standards. In lawsuits of this complexity, the interests protected by this procedural rule of due process carry greater weight than the interests served by the constitutional guarantee of jury trial.<sup>400</sup>

Others have rejected due process as a basis for denying jury trial,<sup>401</sup> noting that estimation of a jury's abilities in a particular case is too hypothetical and speculative,<sup>402</sup> that judicial discretion to strike jury trial demands on the basis of imprecise due process considerations is too unlimited,<sup>403</sup> that judges are not necessarily better qualified as factfinders,<sup>404</sup> that juries serve important societal functions,<sup>405</sup> and that procedural devices exist to aid and control the jury so that irrational decisions are not made.<sup>406</sup> Thus, after considering the same due process arguments that the Third Circuit found persuasive in *Zenith*, the

400. No. 79-2540, slip op. at 36 (3d Cir. July 7, 1980).

401. See, e.g., *In re U.S. Financial Sec. Litigation*, 609 F.2d at 427-32; *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 934-42; Note, *Unfit for Jury Determination: Complex Civil Litigation and the Seventh Amendment Right of Trial by Jury*, 20 B.C. L. REV. 511, 533-38 (1979) [hereinafter cited as Note, *Unfit for Jury Determination*]; Note, *Preserving the Right to Jury Trial*, *supra* note 7, at 113-20. See also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540, slip op. at 47-52 (3d Cir. July 7, 1980) (Gibbons, J., dissenting).

402. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540, slip op. at 49 (3d Cir. July 7, 1980) (Gibbons, J., dissenting); Note, *Unfit for Jury Determination*, *supra* note 401, at 533-34; Note, *Preserving the Right to Jury Trial*, *supra* note 7, at 113.

403. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540, slip op. at 51 (3d Cir. July 7, 1980) (Gibbons, J., dissenting); Note, *Unfit for Jury Determination*, *supra* note 401, at 534-35.

404. See, e.g., *In re U.S. Financial Sec. Litigation*, 609 F.2d at 431; *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 934-36; Higginbotham, *supra* note 7, at 53.

405. Judge Becker notes that "the Seventh Amendment reflects societal values deeply rooted in our notions of democracy—values which require that factual decisions affecting the life, liberty and property of litigants should, at least at their option, be made by a cross-section of the community, i.e., a jury of their peers." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 938. The values enumerated are (1) the "black-box" ability of a jury to "do 'equity'" without having to specify reasons, (2) the contribution juries make to the legitimacy of the courts and the entire system of government, and (3) the check juries provide on judicial power. *Id.* at 938-42. See also Higginbotham, *supra* note 7, at 52, 56-60; Kaufman, *A Fair Jury—the Essence of Justice*, 51 JUDICATURE 88, 91 (1967).

406. It has been argued, for example, that conceptual difficulties facing juries in complex litigation can be reduced by appointing special masters, appointing neutral expert witnesses, instructing the jury before counsel's opening arguments and before closing arguments, permitting jurors to take notes during the trial, and permitting jurors to take transcripts of testimony and trial exhibits into the jury room. See Note, *Unfit for Jury Determination*, *supra* note 401, at 535-37; Note, *Preserving the Right to Jury Trial*, *supra* note 7, at 115-18. See also BOARD OF EDITORS, FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (1978).

Judicial control may also be exercised through separation of appropriate issues for separate trial, special verdicts, directed verdicts, judgments n.o.v., and remittitur. See *In re U.S. Financial Sec. Litigation*, 609 F.2d 411, 427-29 (9th Cir. 1979); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 936-38; Note, *Unfit for Jury Determination*, *supra* note 401, at 536-37; Note, *Preserving the Right to Jury Trial*, *supra* note 7, at 118-19.

Ninth Circuit came to the opposite conclusion in *In re U.S. Financial Securities Litigation*.<sup>407</sup> The court stated that, "[W]e do not believe any case is so overwhelmingly complex that it is beyond the abilities of a jury."<sup>408</sup>

Whether the Seventh Amendment right to jury trial can ever be denied on the basis of the Fifth Amendment right to due process will probably have to be resolved finally by the Supreme Court. However, whatever the Court's decision, Seventh Amendment historical analysis is likely to remain critical. If the Court adopts the position of the Ninth Circuit, the Seventh Amendment will be the only constitutional provision relevant to determining the scope of the right to civil jury trial. On the other hand, if the Third Circuit's position is correct, it would seem that Seventh Amendment historical analysis must still be conducted first in order to determine precisely which issues should be tried to the judge and which to the jury. Due process concerns over jury competence are relevant only with respect to those issues that are "preserved" for jury trial by the Seventh Amendment. Thus, while some cases may appear inordinately complex at the outset, much of the complexity may vanish when certain issues are separated from the case and tried first to the trial judge. In antitrust cases, for example, much of the complexity may be tied to market structure issues, which historical analysis demonstrates are not preserved for jury trial by the Seventh Amendment. When such issues are decided separately by the court, the level of complexity in a particular case and the burdens of jury service are likely to be reduced considerably. The result in most cases may be that juries will then be in a position to decide the remaining conduct and damage issues without violating the due process rights of any of the parties.<sup>409</sup> This sequential ordering of Seventh and Fifth Amendment analysis comports with the Third Circuit's own caution that "[d]ue process should allow denials of jury trials only in exceptional cases" and that "[b]efore any such denial, due consideration should be given . . . to

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407. 609 F.2d 411 (9th Cir. 1979).

408. *Id.* at 432.

409. *Zenith* itself may be such a case. The Third Circuit noted that the case may tax the abilities of a jury because it involves complicated issues of conspiracy over a 30-year period involving over 100 firms, complicated pricing schemes, predatory intent, and market structure issues of relevant product and geographic markets and market shares. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540, slip op. at 12-13 (3d Cir. July 7, 1980). The case was remanded to the District Court for determination, in light of the due process standards articulated by the Third Circuit, of whether the case is too complicated for a jury. On remand, it is entirely possible that if Judge Becker severs and separately tries the market structure issues, as he may consistent with the Seventh Amendment, and also applies other devices and techniques for simplifying the litigation, then the issues remaining for jury trial may not be found to be so complicated as to make trying them to a jury a denial of due process.

methods of reducing the suit's complexity."<sup>410</sup>

### CONCLUSION

The separation and judicial resolution of market structure issues is certainly not a panacea for all the problems associated with complex antitrust litigation. Such an approach, however, is likely to produce a number of benefits, even in cases that retain complex issues of conduct and damage, which must still be decided by a jury.

Perhaps the most important benefit to be anticipated from judicial determination of market structure issues is the clarification and advancement of market structure doctrine as it pertains to various substantive antitrust offenses.<sup>411</sup> When tried to a jury, such issues are often blurred or shielded from scrutiny by the jury's general verdict. Because judges will be expected to render findings and conclusions in support of their market structure decisions,<sup>412</sup> a more rigorous and reasoned analysis can probably be expected, for the obligation to explain disciplines the mind and checks capricious behavior. Moreover, the public nature of written findings and conclusions facilitates close scrutiny and the correction of error by appellate courts,<sup>413</sup> commentary by critics and scholars, and the development of brighter lines that can be more easily identified and followed by the business community.<sup>414</sup>

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410. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540, slip op. at 41-43 (3d Cir. July 7, 1980). The court noted that "severance of multiple claims [and] thoughtful use of the procedures suggested in the Manual for Complex Litigation" can reduce complexity and enhance a jury's ability to comprehend a difficult case. *Id.* at 41. To determine whether the remaining issues were still too complex for a jury the court articulated the following standard:

For the unusually complex case the district court can take a fairly objective measure of its complexity by examining three factors which contribute to a jury's inability to understand the evidence and legal rules: first, the overall size of the suit, the primary indicia of which are the estimated length of trial, the amount of evidence to be introduced and the number of issues that will require individual consideration; second, the conceptual difficulties in the legal issues and the factual predicates to these issues, which are likely to be reflected in the amount of expert testimony to be submitted and the probable length and detail of jury instructions; and third, the difficulty of segregating distinct aspects of the case as indicated by the number of separately disputed issues related to single transactions or items of proof.

*Id.* at 42. It should be emphasized that the due process concerns raised by the Third Circuit are applicable only to extraordinarily complex cases. Seventh Amendment historical analysis would still control exclusively resolution of jury trial questions in the vast majority of antitrust cases.

411. It would not be unreasonable to expect, for example, the development and articulation of market structure standards in substantive antitrust areas where such standards are presently vague or undeveloped, *e.g.*, Clayton Act § 3, 15 U.S.C. § 12 (1976) or Sherman Act § 1, 15 U.S.C. § 1 (1976).

412. FED. R. CIV. P. 52(a).

413. *See, e.g.*, *Telex v. IBM Corp.*, 510 F.2d 894 (10th Cir. 1975).

414. Urging judicial resolution of antitrust issues (but without addressing constitutional questions), Professors Areeda and Turner observe that:

[O]nly judicial resolution can cumulate the experience of the courts and thereby move the judges to increasingly higher levels of appreciation about the subject. The custom

A variety of efficiencies may also result. A clear decision concerning market structure issues in the pretrial stages of litigation promises to facilitate rational settlement negotiation and to weed out unmeritorious claims at an early stage. Savings in judicial time and the time and expenses of the parties may also result, because it may be possible to streamline and focus the discovery of conduct and damage issues once the market structure issues are decided. Moreover, even in cases that are eventually tried to a jury, the trial will be shortened because the jury will not have to resolve complicated market structure issues. While final conclusions must await experience, it is not unreasonable to assume that the judicial resolution of market structure issues will reduce the total time and expense of much antitrust litigation.

The allocation of conduct and damage issues to the jury and market structure issues to the judge also preserves many of the benefits of jury trial, while at the same time utilizes the judiciary's expertise and ability to bring a wide variety of decisional tools to bear upon complex and difficult issues. For example, many praise the ability of the jury system to draw upon the collective experience and wisdom of twelve individuals.<sup>415</sup> To the extent that experience and wisdom is likely to be relevant in an antitrust suit, however, it is probably squarely in the area of conduct and damages,<sup>416</sup> issues that remain, after historical analysis, within the province of the jury. With respect to those issues, juries may continue to perform as a "black box," administering "jury equity" and acting as a check upon judicial power free from the constraint of written findings and conclusions.<sup>417</sup>

Market structure issues, on the other hand, are laden with theoretical economic concepts and are not likely to be within the common ex-

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and necessity of an opinion explaining a judge's basic, intermediate, and ultimate findings both discipline the process and memorialize the experience for the benefit of other judges facing similar problems. And because the later judge will either decide the same way or explain why he didn't, the law tends toward a greater uniformity and predictability than would be possible with unelaborated jury verdicts. And that is an important virtue. The business behavior addressed by antitrust law is planned and calculated and therefore capable of self-control by the participants when they know the governing legal rules. Decisions by judges rather than juries are more likely to provide that guidance.

2 P. AREEDA & D. TURNER, *supra* note 4, ¶ 315, at 54-55.

415. Judge Becker, for example, stated that in his view, "A jury, applying its collective wisdom, judgment and common sense to the facts of a case (in the light of proper instructions on the law) is brighter, more astute, and more perceptive than a single judge, even in a complex or technical case; at least it is not less so." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 935.

416. Arguing that juries should decide issues of conspiracy and predatory intent (clear conduct issues under the analysis in this Article), Judge Becker noted in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. at 935-36 (footnote omitted): "These allegations, if legally sufficient, will call for just the kind of judgments of fact that are traditionally within a jury's competence and for which a jury's unique abilities are especially valued."

417. *See* note 405 *supra*.

perience of jurors. It is precisely these issues that historical analysis indicates are not preserved by the Seventh Amendment for jury trial. While there can be no certainty that a single judge will decide market structure issues more intelligently than a jury, judges will invariably have wider legal experience, will have the advantage of being able to learn from previous cases, and can draw upon procedures and techniques that are unavailable to juries.<sup>418</sup> Possessed of these benefits, judges are likely to decide market structure issues more rationally and consistently than juries. Historical analysis to determine the scope of the right to jury trial of antitrust issues thus seems to produce an allocation of decisionmaking between judge and jury that is at once faithful to the Seventh Amendment and beneficial to the courts and litigants alike.

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418. See text accompanying notes 387-88 *supra*. See also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, No. 79-2540, slip op. at 38-39 (3d Cir. July 7, 1980), in which Chief Judge Seitz observed that:

[A] judge will almost surely have substantial familiarity with the process of civil litigation, as a result of experience on the bench or in practice. This experience can enable him to digest a large amount of evidence and legal argumentation, segregate distinct issues and the portions of evidence relevant to each issue, assess the opinions of expert witnesses, and apply highly complex legal standards to the facts of the case. The judge's experience also can enable him to make better use of special trial techniques designed to help the factfinder in complex cases, like colloquies with expert witnesses.